

# SIG TUR AD ASTRA

III

EDITORS  
GERGELY GOSZTONYI  
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KINGA BELIZNAI BÓDI

Collection  
of student papers  
on **Hungarian**  
and **Croatian**  
legal history 2018

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Eötvös Loránd University / Faculty of Law / Department of the History of Hungarian State and Law / 2019

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## Croatian–Hungarian Legal History Summer School

The Croatian–Hungarian Legal History Summer School was organised for the first time in 2016 in Budapest as a result of the cooperation of the Eötvös Loránd University, Faculty of Law and the University of Zagreb, Faculty of Law. The two History of State and Law Departments of these universities published the best student presentations in the books entitled *Sic itur ad astra I.* (ISBN 978-963-284-935-5, Eötvös Loránd University Faculty of Law, Budapest, 2017, 64 p.) and *Sic itur ad astra II.* (ISBN 978-963-284-935-5, University of Zagreb Faculty of Law, Zagreb, 2018, 64 p.)

Our third summer school was organized again in Budapest in 2018. The topic was „The development and codification of criminal law and criminal law procedure after 1848”. Fourteen, Master and Ph.D. level students held their presentations, most of them – beside the publication of Dr. Imre Képešy who held the Professor’s Lecture – are listed in this book.

We hope that our students will actually reach the stars and that we will find their names and scientific achievements in similar publications in the future as well.

Budapest–Zagreb, 2019.

The Editors

# **Dr. Imre KÉPESSY: The Influence of the Austrian Laws on the Creation of the first Hungarian Criminal Code**

**Eötvös Loránd University, Faculty of Law**

## **1. Introduction**

On June 15, 1880, when Emperor Franz Joseph promulgated Act 37, the last obstacle that prevented the first Hungarian Criminal Code from coming into force, disappeared.<sup>1</sup> The enactment of this law marked a very important milestone for many people for various reasons. For Károly Csemegi, who wrote the whole draft single-handedly, meant the completion of a job that lasted almost for a decade. For the country, it meant that 170 years after the first draft being published, the codification process reached its purpose. Finally, for the Ministry of Justice, it meant that a promise, which was made by Boldizsár Horvát originally, was achieved finally. He as the first minister of justice appointed after the Austro–Hungarian Compromise of 1867 aimed for the enactment of a modern criminal code from the moment taking the oath into office. Even if he could not deliver this promise, there was no difference between him and his successors, like Tivadar Pauler and Béla Perczel. To understand, why the enactment of the Criminal Code lasted so long and why it became so urgent in the 1870s, I would like to quote Imre Hodossy, a member of the so-called Deák-Party i.e. the governing party at the time. On November 15, 1873, when the members of the Parliament argued whether they should put the debate of the Criminal Code on the agenda, he said the following: “To this day, the Austrian Criminal Code is in effect in Transylvania and the Croatian Military Frontier; (...) meanwhile, in Hungary in the narrower sense, the Criminal Code can be summarized in one sentence: judicial tyranny.”<sup>2</sup>

After 1541, when the Ottoman Empire seized control of Hungary’s capital and divided the country into three territories, any attempt at codification seemed impossible. When the 150-year-long war period ended, the southern border remained under military

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<sup>1</sup> ILLÉS, Károly: A büntető törvénykönyv magyarázata [The Criminal Code Annotated] vol. I, Budapest, 1894, Révai testvérek kiadása, p. 22.

<sup>2</sup> LÖW, Tóbiás: A magyar büntetőtörvénykönyv a büntettekről és vétségekről (1878:5. tcz.) és teljes anyaggyűjteménye [The Hungarian Criminal Code on Felonies and Misdemeanours (Act 5 of 1878) with all the Documents]. Budapest, 1880, Pesti Könyvnyomda, p. 23. Regarding the contemporary judicial practice see: PAULER, Tivadar: Büntetőjogtan [Institutions of Criminal Jurisprudence] vol. I, Budapest, 1872, Pfeifer Ferdinánd pp. 17–18.

rule and Transylvania was treated as a separate territory in the Habsburg Empire. From the 18<sup>th</sup> century, many Austrian laws came into force in these territories, for example the *Sanctio Criminalis Josephina* and the Austrian Criminal Code of 1803.

In Hungary, the Austrian laws were applied to a much lesser extent. Apart of the *Praxis Criminalis* of 1656, which was used in the western territories of the country until the 18<sup>th</sup> century, only the *Josephina* was in force for three years at the end of the rule of Joseph II. On the other hand, I must note that various internal and external political circumstances hindered the Hungarian Parliament from codification. Therefore, most legal institutions within criminal law were based on customs until the mid 19<sup>th</sup> century. Still, parliamentary committees were tasked with the creation of draft criminal codes from the beginning of the 18<sup>th</sup> century. The last proposal was completed in 1843 and it was held in the highest regard even by the contemporary German legal experts. In 1848, when the Hungarian statesmen tried to achieve fundamental reforms by changing the form of government into a constitutional monarchy, the war of independence broke out which Hungary lost. This development gave the opportunity to the Austrian government to unify the legal system in the whole Empire. Therefore, the Austrian Constitution of March 1849, which according to the doctrine of constitutional forfeiture in Hungary introduced a so-called neo-absolutist regime, which caused longlasting consequences in our legal system. In criminal law, the Viennese Government imposed the Criminal Code of 1852 onto the entire country on May 27, 1852.<sup>3</sup> The Austrian Code of Criminal Procedure entered into effect the following year. In 1855, the Military Criminal Code was promulgated in the entire Empire.<sup>4</sup>

In 1860, fundamental changes came with the proclamation of the October Diploma due to the defeat in the Austro–Sardinian War. With this new constitution, Franz Joseph tried to achieve a compromise with Hungary. First of all, it declared that the Hungarian Constitution should be restored – with some restrictions. I cannot go into further details, but I must point out that the Hungarian judicial system was restored mostly. This development caused many issues, mainly because the newly organised Hungarian courts did not want to base their rulings on the imposed Austrian laws. A commission was

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<sup>3</sup> See: NESCHWARA, Christian: *Österreichs Recht in Ungarn* [Austrian Law in Hungary]. In: *Rechtsgeschichtliche Vorträge* 52. Budapest, 2008, Gondolat Kiadó, p. 106.

<sup>4</sup> The latter stayed in effect in Hungary until the end of World War I. See: FINKEY, Ferenc: *A magyar büntetőjog tankönyve* [Textbook of Hungarian Criminal Law], Budapest, 1914, Grill Károly Könyvkiadóvállalata, pp. 128–129.

organised by the chief justice in early 1861, which adopted the so-called Provisional Judicial Regulations. In the field of criminal law, the old Hungarian customs were reinstated with some amendments.<sup>5</sup> However, Emperor Franz Joseph did not restore the territorial integrity of the country in 1861. Therefore, these provisions could not have any effect neither in Transylvania nor in the Croatian Military Frontier where the Austrian laws remained in force.

Furthermore, the adoption of the Provisional Judicial Regulations caused legal uncertainty due to the fact that the judges were not sure which provisions to apply in some cases. Therefore, a commentary was made by the future minister of justice, Tivadar Pauler, three years after the reinstatement of the Hungarian laws. This book was used basically as a criminal code by the judges. The author referred not only to the old Hungarian customs but also both to the provisions of the Hungarian Proposal of 1843 and the Austrian Criminal Code of 1852. Furthermore, he stated that the common source of criminal law was the Austrian Criminal Code. Pauler reiterated this notion in the subsequent editions in 1869 and 1872. Consequently, the Austrian laws influenced the legal practice in the whole country directly or indirectly even after the Austro–Hungarian Compromise of 1867.<sup>6</sup>

## **2. The Creation of the Criminal Code**

In 1867, a new Hungarian government was formed by the Emperor. Its members carried a great responsibility, which can be summarized by quoting the words of Boldizsár Horvát: “If we look around in the country, it is hard to find any institutions that, as they exist, could be implemented in the parliamentary regime. There are scarcely any institutions adopted from the past that does not need to be altered or replaced fundamentally by new ones.”<sup>7</sup> This sentiment was true in most cases, the criminal law meant an exception though. Even if no previous attempt at the codification came to fruition, some of those drafts could serve as source for the contemporary law-making. The most famous one was the proposal which

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<sup>5</sup> The so-called High Judge Conference of 1861 deemed the Hungarian criminal laws and customs applicable even in cases, where the crime was committed before July 23, 1861, i.e. when the Austrian Criminal Code was repealed in Hungary. Their reasoning was that the Hungarian laws were more lenient compared to their Austrian counterparts. See: FINKEY, *op. cit.*, 1914, p. 84.

<sup>6</sup> PAULER, *op. cit.*, 1872, p. 18.

<sup>7</sup> Képviselőházi napló 1869–1872 [Journal of the House of Representatives 1869–1872]. Session 34, 23 June 1869, p. 65.



was elaborated by Ferenc Deák and László Szalay in 1843. It proposed the abolishment of the death penalty and tried to introduce the jury system in criminal procedure. In his reasoning, even Csemegi wrote that it was a magnificent memento of the progress our country made during the 1830s.<sup>8</sup>

The course of the future codification was set by the minister of justice when he organized a committee to revise the proposal of 1843 soon after entering into office. Its members finished this task in a short time. The minister of justice was not satisfied with the results though. I cannot go into details why it was rejected but I must emphasize two aspects. First of all, the Proposal of 1843 was filled with undiminished optimism.<sup>9</sup> Its creators wanted to establish the most forward-looking criminal justice based on the most modern ideas in a country that did not have even one prison functioning adequately.<sup>10</sup> Furthermore, the debates regarding the Criminal Code were imbued with politics in the 1840s deeply. Its creators wanted to abolish the death penalty not only because they thought it was inhumane. In the past, the Habsburg rulers had sentenced many people to death due to political reasons. Therefore, they also wanted to limit the power of the King. Many of the proposed changes were based on ideas that were radically new, therefore untested at the time. By the 1870s, more experience was available. Furthermore, the Irish system of prison administration was conceived in the early 1850s which was superior to the instruments used in the Proposal of 1843.<sup>11</sup> Consequently, the minister decided that a new proposal shall be made.<sup>12</sup> In July 1870, the minister asked Károly Csemegi to create the draft.<sup>13</sup>

The duty of Csemegi as codifier can be summarized as the following: most importantly, he had to make a new draft while also taking into account the previous proposal. He himself stated that „constant and relentless attention was given to the Proposal of 1843, there is not one provision in this draft that would contradict it.”<sup>14</sup> Still, we know that there is an exception to every rule in the world of law, so we should not be

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<sup>8</sup> Löw, *op. cit.*, 1880, p. 23.

<sup>9</sup> MEZEY, Barna: Realitás és illúzió – az 1843. évi börtönügyi törvényjavaslat vitái [Reality and Illusion – The Debates on the Prison Reform Proposal of 1843]. *Jogtörténeti Szemle*, 1992/4, p. 43.

<sup>10</sup> *Ibid.*, p. 43.

<sup>11</sup> See: MEZEY, Barna: Strafrechtskodifikation in Ungarn im Jahre 1878 [Codification of Criminal Law in Hungary in 1878]. In: *Strafrechtsgeschichte an der Grenze des nächsten Jahrhunderts* [History of Criminal Law on the Edge of the Next Century], Budapest, 2003, Gondolat Kiadó, pp. 157–158.

<sup>12</sup> Löw, *op. cit.*, 1880, p. 24.

<sup>13</sup> ILLÉS, *op. cit.*, 1894, p. 18.

<sup>14</sup> Löw, *op. cit.*, 1880, p. 25.

surprised at the end of his sentence: „except if the departure seemed inevitable after careful deliberation”.<sup>15</sup> This was due to the fact that he was also tasked to incorporate the newest findings of the European jurisprudence. In the end, Csemegi made a new proposal from the ground up that was influenced deeply by the contemporary European codes and drafts. According to Ferenc Finkey, a famous criminal lawyer at the turn of the 19<sup>th</sup>–20<sup>th</sup> century, Csemegi based his draft on the Austrian Proposal of 1870, the German Criminal Code of 1871, the Code Penal, the Belgian Code of 1867 and the Italian proposal. He added that it followed mostly the German Code.<sup>16</sup>

This was no coincidence. After the Austro–Hungarian Compromise, the legislators became more open-minded to make fundamental reforms in our legal system by adopting legal instruments from the countries of Western Europe. According to Barna Mezey: „After 1867, another type of lawyer was sought for: the codifier. The calm, clear-headed, open-minded, and educated legal expert. The legislation was in the centre of everything, because a civil legal order had to be made from nothing. (...) Such lawyers were needed, who translated the main principles into certain provisions.”<sup>17</sup>

Just like the Code, its creator was also inseparable from this era. Like the author of Csemegi’s biography stated: „This period, which gave us famous poets, writers, politicians, painters, actors and actresses, could only produce such a codifier, as Csemegi.”<sup>18</sup> Barna Mezey wrote in his paper that: „The European mentality of the Reform Era (...) became the most deciding aspect for him in his later life.”<sup>19</sup> Until the 19<sup>th</sup> century, the uniqueness of the Hungarian legal system was seen by many legal experts as a fundamental aspect of our national identity. Therefore, most lawyers opposed the idea of adopting foreign legal institutions. Yet, a new type of jurisconsults emerged from the 1830s. They wanted to modernize the country and to do so, they were well versed in the jurisprudence of the Western European countries. These liberal lawyers were also involved in the national

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<sup>15</sup> The Government argued that the Proposal of 1843 would be judged fundamentally differently if it would have entered into effect. See: Képviselőházi irományok [Papers of the House of Representatives] 1875, Volume 5, p. 139.

<sup>16</sup> FINKEY, *op. cit.*, 1914, pp. 84–85.

<sup>17</sup> MEZEY, Barna: Egy jogászkarrier a 19. században (Csemegi Károly 1826–1899) [A Career of a Lawyer in the 19<sup>th</sup> Century (Károly Csemegi 1826–1899)] In: A Praxistól a kodifikációig. Csemegi Károly emlékére (1826–1899) [From legal practice to codification. In memoriam Károly Csemegi (1826–1899)] Budapest, 2001, Osiris Kiadó, p. 18.

<sup>18</sup> HAJNAL, Hugó: Csemegi Károly [Károly Csemegi], Budapest, 2003, Gondolat Kiadó, p. 148.

<sup>19</sup> MEZEY, *op. cit.*, 2001, p. 16.

politics as they goal was to secure the acceptance of their planned reforms through legal instruments. Csemegi followed them in their footsteps.

His personal circumstances were also important. „In his youth, her mother spoke with him only in German, while his father was excellent in French.”<sup>20</sup> His „talent in command of the languages like English, French, Greek, Latin, German and Italian gave him an incredible chance to be familiar with the latest trends in the European codification”.<sup>21</sup> His favourite reading was the Code Pénal. He was intrigued by the influence some legal experts made on the legislation. The complete works of Cesare Beccaria, Giovanni Carmignani and Francesco Carrara could be found in his personal library.<sup>22</sup>

### **3. The influence of the European jurisprudence**

We can state that every draft criminal code was influenced more or less by their respective eras. The Proposal of 1795 adopted the principle of legal equality. The proposal of 1829 regulated the transgressions for the first time. Still, none of them was so fundamentally defined by the newest, most progressive ideas than the proposal of 1843. As previously stated, the Csemegi Code was also under the influence of the contemporary European legislation, but only in a more conservative way. Csemegi did not want to adopt the newest ideas. He looked at formulas that were already well-tried. Nonetheless, the contemporary European criminal lawyers had their fair share of debates. According to Csemegi, the discussions focused around the following topics in the 1870s:

- Should a distinction be made between felonies and misdemeanours?
- The issue of the death penalty;
- The admissibility of the life sentence;
- The stages in the prison system;
- The upper limit of imprisonment and whether the criminal code should set a lower limit;
- The issue of *praeter intentionem*;
- The punishment of those perpetrators who intended to commit a lesser crime than it was conducted by one of their accomplices;

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<sup>20</sup> *Ibid.*, p. 10.

<sup>21</sup> *Ibid.*, p. 22.

<sup>22</sup> *Ibid.*, p. 21.

- The Criminal Code should regulate the crimes conducted via the press or they should be treated separately?<sup>23</sup>

#### 4. Trichotomy in the offences

In the following, I would like to concentrate on the first two points. Regarding the criminal offences, the "old" Hungarian judicial practice differentiated between two categories: *crimen* (as felonies) and *delicti* (as misdemeanours). The Proposals of 1829 and 1843 made a distinction between felonies and transgressions. According to Finkey, the trichotomy in the criminal offences was introduced by the Austrian Criminal Code and Csemegi followed this example.<sup>24</sup> Moreover, Csemegi added that as a consequence to the material norms of the criminal code, it should differentiate between several stages in the prison system based on the severity of the criminal offences. Therefore, he differentiated between felonies, misdemeanours and transgressions in the offences.<sup>25</sup> He stated that his goal was to create a system a punishment that was humane but also just and rigorous.<sup>26</sup>

He also mentioned that the Belgian Criminal Code of 1867, the German Code and both the Italian and Austrian drafts embraced the system of trichotomy.<sup>27</sup> Still, Csemegi had to defend his position not only on the floor of the Parliament but also against many legal experts. They argued that this method will only make the criminal code unnecessarily convoluted. Decades later, some legal experts pointed out that the most European countries had reverted back to the dual system after the enactment of the Hungarian Code.<sup>28</sup> Still, the Hungarian Criminal Code differentiates between these categories even to this day.

#### 5. The issue of the death penalty

The most intense debates surrounded the issue of death penalty. Csemegi, even if in a very restricted sense, maintained this form of punishment. He emphasized that he did not base

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<sup>23</sup> LÖW, *op. cit.*, 1880, p. 26.

<sup>24</sup> FINKEY, *op. cit.*, 1914, p. 223.

<sup>25</sup> LÖW, *op. cit.*, 1880, p. 40.

<sup>26</sup> *Ibid.*, p. 40.

<sup>27</sup> *Ibid.*, p. 39.

<sup>28</sup> See: ILLÉS, *op. cit.*, 1894, p. 13.

this decision on theoretical grounds. In his reasoning, he briefly referred to the issue whether the capital punishment was justifiable. However, he did not give an answer to this question. Instead, he focused on whether the death penalty was necessary. He stated that: „If Belgium, Germany, Italy and France did not dare to abolish the death penalty; furthermore, if it was reinstated in several countries where it was abolished: looking at the public security in Hungary, we cannot state that this punishment, which is needed everywhere, would be unnecessary”.<sup>29</sup> He thought, that when the day would come, the Hungarian Parliament would „repeal this horrible punishment from the criminal code”,<sup>30</sup> He also argued that the abolishment should occur gradually. At first, its applicability needed to be restricted to the most severe crimes, like the legislation did in Belgium, England, Germany and Italy.<sup>31</sup> His closing argument was the following: „There is no proper reason for a legal provision to exist than its necessity.”<sup>32</sup>

Csemegi did not forget to mention, which countries repealed the capital punishment in the 1860s and 1870s. In his reasoning, he wrote that it was abolished in Saxony in 1868 but it was reinstated by the German Criminal Code two years later. It was repealed in Tuscany in 1859 but it was reinstated by the Italian Criminal Code of 1866. At the time, it was abolished only in Portugal (1867), Romania (1864) and in the cantons of Zürich (1871) and Basel (1873).

It is also worth mentioning, that Csemegi’s proposal did not deviate from the judicial practice after the Austro–Hungarian Compromise. Without Transylvania, the Hungarian courts sentenced 28 people to death between 1869 and 1873. All of the perpetrators were found guilty in murder. The code added only one instance where the death penalty was applicable: the murder and homicide of the King.<sup>33</sup>

## 6. Summary

After the Austrian–Hungarian Compromise of 1867, the reinstatement of the Hungarian Constitution as a whole enabled the Parliament to perform its legislative duties. After that,

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<sup>29</sup> Löw, *op. cit.*, 1880, p. 49.

<sup>30</sup> *Ibid.*, p. 49.

<sup>31</sup> *Ibid.*, p. 49.

<sup>32</sup> *Ibid.*, p. 49.

<sup>33</sup> *Ibid.*, p. 50.

a new period began in the Hungarian legal history when the lawmakers became truly open-minded to adopt foreign methods.<sup>34</sup> In the 1870s, the basic requirement for every codifier was to be fluent in several languages so they would be able to compare the legal institutions in as many European countries as possible. Their job was to find the most progressive solutions and implement them into the Hungarian legal system. In my opinion, the Csemegi Code was the embodiment of this intention. Although it was not perfect, but Károly Csemegi created a criminal code that gave a solid foundation for the criminal justice system until the mid 20<sup>th</sup> century. He did not want to adopt the most recent and modern ideas; his intention was to adopt those solutions that were well-tried. He was not devoted to the Hungarian legal traditions; his aim was to contribute to the creation of a modern legal system. Therefore, he created a code that was both European and Hungarian, progressive and realist.

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<sup>34</sup> GOSZTONYI, Gergely – BÓDINÉ BELIZNAI, Kinga: Az országgyűlés [The Parliament]. In: Képes György (ed.): A hatalommegosztás államszervezete, 1848–1949. Magyar alkotmány- és közigazgatástörténet a polgári korban [The state structure of separation of powers, 1848–1949. History of Hungarian constitution and public administration]. Budapest, 2013, ELTE Eötvös Kiadó, pp. 91–117.

# Lajos Ármin GRIMM: The Parliamentary Dispute around the Csemegi Code

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## 1. Introduction

Károly Csemegi is a key figure of Hungarian criminal law, who dedicated his life to the law and the country. The first Hungarian Criminal Code was named after him. However, the greatest work of his life had a pretty cloddish journey until the Parliament accepted it. Before we move on and analyze how he laid down one of the principles of the modern civil Hungarian legal system, we must have a look at his personal life and career and also examine the background of the dominant political procedures at that period.

Károly Csemegi, originally born as Károly Nasch on May 3, 1826, in Csongrád. His family was not poor, he shared a house with his two brothers and parents. His father taught him French, while his mother spoke to him in German, so at such a young age he was in possession of two foreign languages. He completed his studies really conscientiously and excellently from the very beginning, in the 4<sup>th</sup> grade of the elementary school he was even considered as the "eminent of the class". He spent the first years of high school in Pest at the Piarists, and then continued his studies in Szeged and after just one year there he returned to the Piarists. Here, he first got in touch with Latin language and later he went on to be an expert in this area too. In addition he made friends with Baron Dénes Bánffy, Salamon Gajzágó and Sándor Funták,<sup>1</sup> who reached the top of the legal profession, along with Csemegi.<sup>2</sup> He completed the last two grades in Szeged, during this period he learned Italian and Greek too, so he could already speak and read in five foreign languages at a high level, although he was still very young. Besides these skills, he was also found of reading, especially the ones in connection with law and politics: he could easily evoke Ferenc Kölcsey's speeches and among Csemegi's favourite readings we can find the Criminal Code Proposal of 1843 as well as the French Code Pénal. In 1843 he moved to Pest to learn law. During this time he shared the same room with Frigyes

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<sup>1</sup> Salamon Gajzágó was the first president of the Hungarian Court of Auditors, he was also the member of the Upper House from 1893. Sándor Funták was a lawyer in Budapest, but he was known for being a decisive member of the Hungarian Bar.

<sup>2</sup> HAJNAL, Hugó: Csemegi Károly [Károly Csemegi]. Budapest, 2003, Gondolat Kiadó, pp. 9–11.

Korányi, who is considered as one of the best internist professors ever in Hungary, they got on well with each other. Korányi introduced him to the Fischer family, where Csemegi became the family's private tutor, but also a private tutor of his later wife. He got married with Franciska Fischer in 1854. In the course of his career his wife has always encouraged and supported Csemegi, playing a background role in the codification too.

In 1846, he was already in praxis as a lawyer and he was also elected as the scrivener of Csongrád county. He put the country above everything else: during the Hungarian Revolution and War of Independence of 1848–1849 he gave evidence of his calibre and as a result of this he got appointed as major.<sup>3</sup> After the lost Revolution and War of Independence he got into a prison in the castle, but he kept it in secret through his whole life. However, during this terrible period he got in touch with the English language, which allowed him to examine the English criminal law literature and later he could use this knowledge in the codification work. In spite of these horrible happenings, he stood upon his dream and continued his legal career as a lawyer first in Arad, then in a little peripheral town, Butyin. As the enemy of the system – due to his participation in the Revolution and War of Independence – in the Bach's era he was kept under continuous police inspection, but the reputation he gained, did not decreased. His publicist activity came into the prominence when he wrote professional articles in *Pesti Napló (Journal of Pest)*, and as a result he gained the attention of Ferenc Deák as well the Minister of Justice, Boldizsár Horvát.

## **2. From a Proposal to an Act of Parliament**

In 1871 it was clear for Deák, that although the Criminal Code Proposal of 1843 gives the directives, it is overgone and void, it needs to be systematized urgently. This enormous task demands a sharp-witted professional and it seemed that Csemegi had all the potential that this codification required. When Deák and Horvát asked him for the codification, he euphorically accepted "the job", he felt totally honoured that he was encharged with the codification of the Hungarian criminal law.<sup>4</sup> He was appointed as a councillor at the Ministry of Justice, where he worked until the end of the year 1878, he even reached the

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<sup>3</sup> MEZEY, Barna (ed.): A praxistól a kodifikációig. Csemegi Károly emlékére [From praxis to the codification. In the memory of Károly Csemegi], Budapest, 2001, Osiris Kiadó, pp. 10–11.

<sup>4</sup> HAJNAL, *op. cit.*, pp. 40–44.



deputy undersecretary and the undersecretary position. Then he experienced the judicial career: from November 3, 1878 he was the Presiding judge of the Supreme Tribunal until 1882, and from that time he became the Presiding judge of the Curia. To understand why Csemegi's work was really unique, we need to have a look at Europe in the last third of the 19<sup>th</sup> century.

A codificational wave swept across the unifying states' legal systems, especially in the area of criminal law: in France, Italy and Germany. Csemegi's comprehensive linguistic knowledge allowed him to understand the newborn criminal codes and to replant them into the Hungarian legal system through the codification. The Austro-Hungarian Compromise of 1867 had a big impact on laying down the core principles of the Hungarian Government of laws to which Csemegi contributed with works such as Act 4 of 1869 about the judicial authority or Act 33 of 1871 about the Royal Prosecution. He had to put lots of energy to make the work of his life. The horrendously hard work paid off, because it became part of the Hungarian legal history, later it became known as the Csemegi Code<sup>5</sup>. The hardest part was definitely to make the Parliament accept the Proposal,<sup>6</sup> but Csemegi successfully proved that his work was worthy of being the first codified and systematized criminal code in Hungary, so the law was enacted. Through the tremendous amount of disputes in the Parliament, it was clear that Csemegi was extremely sophisticated and well-informed too. Some of his contemporary members of the Parliament claimed that his expression brought something new to the Parliament, because it was so elemental and extraordinary.

In 1872 the Minister of Justice, Tivadar Pauler<sup>7</sup> back then, commissioned Csemegi to make the Proposal. Csemegi was ready with the first Proposal through 1872–73, and it was published under the name "Törvény javaslat", which is the Hungarian term for B Proposal ill. Before the Proposal was put forward, a conference took place with such big minds like the earlier mentioned Sándor Funták, Sándor Kozma, the attorney general and József Sárkány, the president of Court of Justice in Budapest. The Proposal was revised four times during this time. The final Proposal was put forward by Tivadar Pauler in 1873 to the

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<sup>5</sup> MEZEY 2001, *op. cit.*, p. 12.

<sup>6</sup> GOSZTONYI, Gergely – BÓDINÉ BELIZNAI, Kinga: Az országgyűlés [The Parliament]. In: KÉPES, György (ed.): A hatalommegosztás államszervezete, 1848–1949. Magyar alkotmány- és közigazgatástörténet a polgári korban [The state structure of separation of powers, 1848–1949. History of Hungarian constitution and public administration]. Budapest, 2013, ELTE Eötvös Kiadó, pp. 91–117.

<sup>7</sup> Tivadar Pauler, Minister of Justice 1878–1888

Parliament. However, it could not be discussed, because the Parliament was eventually dissolved. Later, Béla Perczel, the Minister of Justice put forward the Proposal to the House of Representatives on November 5, 1875. Then the Proposal was instructed to the Commission of Justice. Csemegi attached a 700 pages long justification to his work, confirming every single provision of it by legal and psychological arguments, comparing it with other nations' legal system and legal philosophy too, proving its correctness. We could barely find such a prepared character and such a well-composed work in Hungary's history. The conference of the Commission of Justice – held by Tivadar Pauler and Boldizsár Horvát – lasted for one and a half year between April 3, 1876 and September 15, 1877. Through this time Csemegi provided 101 (!) speeches, convincing the Commission, so eventually it accepted the Proposal. In November the House of Representatives received the Proposal, then the Upper House accepted it too in April, 1878 and eventually the king sanctified it on May 27, 1878. Two days after this, on May 29 the Parliament enacted the law.<sup>8</sup> We must make it clear, that this Criminal Code (Act 5 of 1878) and the Act 40 of 1879 about petty offences together form the first Hungarian criminal codes, which became Act of Parliament.<sup>9</sup> This little overview is necessary to understand the advantages and disadvantages of the Criminal Code.

Judging by politics' nature, we could say it is not a surprise that the government and the opposition cannot agree in some questions, not even in a question that has such a great consequence concerning the country's future. So, many aspects of the Proposal were questioned many times by the opposition, but theoretical convictions played part of the criticism too. Among the critics we could find Béla Komjáthy, Dezső Szilágyi, Ignác Helfy and Ede Zsedényi too.<sup>10</sup>

At the same time it would be hard to deny that a Proposal which is followed by a justification with a length of seven-hundred pages cannot be questioned in every aspect of it. So the most of the criticism were based on arguments such as the old stage is better, there is not even time for a change, because there are other issues that need to be dealt with. Ede Zsedényi, right after the Proposal was put forward, highlighted in his first speech,

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<sup>8</sup> HAJNAL, *op. cit.*, pp. 54–56.

<sup>9</sup> MEZEY, Barna (ed.): Magyar jogtörténet [Hungarian Legal History], 4. ed., Budapest, 2007, Osiris Kiadó, p. 330.

<sup>10</sup> Ignác Helfy did not only work as a member of the House of Representatives, but as a writer too. Ede Zsedényi was a member of the Liberal Party, one of his relatives, Béla Zsedényi became the president of the Temporary National Assembly. Dezső Szilágyi was the Minister of Justice between 1889 and 1895. At the time of this parliamentary debate they were all members of the opposition.

that beside the criminal code, a criminal procedure code was highly required, so they could not deal with only the criminal code itself. Ignác Helfy also added on November 23, 1877 in the House of Representatives that in Italy, the substantive and the procedural criminal law was taught by the same instructor, because the two areas formed a unit together. Furthermore Helfy highlighted the essence of the criminal procedure law by claiming that its proper existence and function allows us to make the Criminal Code itself, there cannot be a 20–30 years gap between making the two parts. Csemegi Károly reflected on this speech brilliantly, justifying the priority to make the criminal code: „What is criminal procedure? Does the judge start off by investigating? No, honourable House, he does not. In the case of accusation the judge first has to make sure that the accusation complies with the criterias, which make that activity punishable. If he initiates an investigation without this, he abuses his magisterial obligations, so he is punishable.”<sup>11</sup> So Csemegi had to prepare himself for the critics, but he proved these critics wrong every single time in the Parliament, he did not shrink and he upheld what he made with thoughtful work.

### **3. The major differences between the Csemegi Code and the Criminal Proposal of 1843**

Initially, we must pin down that the Criminal Code Proposal of 1843 was the fundamental document that the Csemegi Code was mainly compared to. Those, who saw that the previous one was clearly overgone and that it did not adjust to the new social-political relations, supported the codification. But on the other side those, who did not see the need for a change could not tolerate any differences. We should say that the creation of the Criminal Code Proposal of 1843 was caused by the dynamic civil development and the infiltration of the Western theories: „in front of its creators eyes there were the solutions of the most developed Western European countries back then”.<sup>12</sup> That is why the Criminal Code Proposal of 1843 was mostly imbibed by deep humanism: it erased stick punishment as well as death penalty and it only fixed the upper bound of the punishments. In contrast with this, the Csemegi Code paid attention to the judicial praxis

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<sup>11</sup> Képviselőházi napló 1875–1878 (Journal of the House of Representatives 1875–1878), Session 310, 23 November 1877, p. 308.

<sup>12</sup> HORVÁTH, Tibor: Az első magyar büntetőkódex 100 év távlatából [The first Hungarian Criminal Code from 100 years perspective], *Jogtudományi Közlöny*, 1979/4, p. 200.

that took shape then, it could benefit from studying the new international criminal codes (e.g. the German Criminal Code from 1871) and in addition, the flourishing law dogmatic direction had an effect on Csemegi's work too (Csemegi was found of this direction).<sup>13</sup> So basically, the new criminal code differed from the previous Proposal from 1843 in three main points: it contained the death penalty, it set a minimum for punishments and it divided the crimes into three parts instead of two. The opposition stood hardly against the introduction of the system of trichotomy (felony, misdemeanour, and petty offence) instead of the previously used system of dichotomy (felony and petty offence), especially Béla Komjáthy, one of the main speakers from the opposition. On February 18, 1878 the Minister of Justice, Béla Perczel justified why the trichotomy was needed on a section of the Upper House like this: „There is a significant difference between a person, who took his fellow human being's life with maleficent intention, and another person who was led by maleficent intention too, but only caused minor bodily injury to another human being, because although the intention was maleficent in both cases, but the seriousness was much different, so we just cannot name both of the activities under the same legal phrase without harming the definition of justice.”<sup>14</sup> As we can see the Csemegi Code made a distinction between felony and misdemeanour by the seriousness of the crime. The previous one (felony) was considered as an intentional and more serious crime, while the latter one (misdemeanour) was considered as an intentional but less serious crime and infringing act resulted from negligence.<sup>15</sup>

Even the opposition could not deny the fact, that most of the European legislations followed the system of trichotomy. Nevertheless, Béla Komjáthy and Ignác Helfy stood against the earlier mentioned system, because they thought that it turned against the country's traditions, just to follow the European tendency. Helfy highlighted in his reflection to Csemegi's speech the following: „It seems to be crystal clear, that he (Csemegi) has the European criminal law knowledge at his fingertips, and he spoke about everything, but Hungary's thousand years old criminal law.”<sup>16</sup> Helfy found the whole Proposal's penal system too strict, especially the introduction of the minimum. Kornél

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<sup>13</sup> *Ibid.*

<sup>14</sup> Főrendiházi napló 1875–1878 (Journal of the Upper House 1875–1878), Session 113, 18 February 1878

<sup>15</sup> MEZEY 2007, *op. cit.*, p. 330.

<sup>16</sup> Képviselőházi napló 1875–1878 (Journal of House of Representatives 1875–1878), Session 310, 23 November, 1877

Emmer<sup>17</sup> supported this new element by setting off that beside its strong international base, it could also create a certain tendency in the judicial praxis regarding making rulings. Reflecting on it, Helfy brought a new point of view, highlighting that the judge is still a person in the first place: „the minimum makes the Act stricter and it puts a huge weight on the judge’s conscience too”.<sup>18</sup>

#### **4. The death penalty**

The disagreements between the two sides regarding the minimum for punishments or the system of trichotomy were based on the Hungarian legal tradition and legal considerations mostly. However the death penalty brings up even harder theoretical questions too. Csemegi took himself far away from putting the most serious form of punishments in the new criminal code being led by just theoretical obstinacies, so he based his decision on the praxis of the sixties and the seventies. In this case, the international legal solutions played significant roles too, because the other legislations in Europe all contained the death penalty. So this fact only strengthened Csemegi in his decision not to cancel this punishment, until the other European countries do.<sup>19</sup>

So one of the biggest disagreements occurred around the area of death penalty. The doubters said that it was unequitable and it did not respect the human’s life worth, because the life was given by the Lord, so only he can take it away, the state should not interfere in this relation. Nevertheless, Károly Csemegi provided a lengthy, but really impressive speech in a section of the Upper House and he proved the necessity of the death penalty by legally, psychologically and statistically verifiable facts. He compared the German Criminal Code’s provisions with the Hungarian one, and he stated that while the German Criminal Code includes an absolute death penalty – so the judge cannot change his judgement to a softer punishment – the Hungarian Criminal Code took notice of extenuating circumstances, and took the extraordinary cases into consideration, so it was not absolute.<sup>20</sup> Moving on, he spoke about the most relevant part of the death penalty: its

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<sup>17</sup> Kornél Emmer was a judge of the Royal High Court from 1882, and became a judge of the Curia in 1891.

<sup>18</sup> Képviseelőházi napló 1875–1878 (Journal of the House of Representatives 1875–1878), Session 310, 23 November 1877

<sup>19</sup> HORVÁTH, *op. cit.*, p. 197.

<sup>20</sup> HAJNAL, *op. cit.*, p. 62.

effect of determent.<sup>21</sup> Basically, Csemegi defined two types of felons<sup>22</sup>: there are ruthless and heartless ones, who cannot be changed on the one hand, and on the other hand there are ones who made a mistake, but regretted it and they can be changed, the latter ones appalled by the idea of death.<sup>23</sup> This is a capital difference, which is said in other words by Csemegi as the following: „Regarding the proportion between felony and punishment I claim, that the more serious the punishment is, the bigger the struggle and hesitation will be due to the fear of punishment.”<sup>24</sup>

As an experienced lawyer, he had the opportunity to observe the psychology of the felons, so he was fully aware of how the felons' whole family dreaded before hearing the judgement itself, hoping their beloved one could stay alive. In other words the family was relieved by avoiding the death penalty, because they interpreted the situation as: „if we escape the hanging, the rest is nothing”.<sup>25</sup> However, Csemegi knew that in the world of law he cannot base his arguments only on theoretical principles, so he let the numbers speak for themselves. He took the events of 1874 as a basis, when only 2 out of 234 robberies resulted in death penalty, while 18 resulted in penitentiary from 10 to 20 years.<sup>26</sup> In the cases regarding penitentiary, although the victim suffered from miserable pain, he survived. The question arises: why did the robbers not kill the victim? Because they knew it exactly that if they kept him alive, the victim will have the most information about the crime, he will remain (probably) the only eyewitness. It seems to be obvious, that the robbers did not spare the victim's life due to some sort of humanity or mercifulness, so then why? The answer shows us the reason why Csemegi deeply believed that the death penalty is essential to have: although the felons were presumably not experts in criminal law, but even they knew that if they had gone further (so killing the victim), it would have had a more serious consequence than keeping him alive. Make no mistake, Csemegi was fully aware of how serious the death penalty was, he even raised his voice about it in one of his speeches: „the state is obliged to start the preparation of the possibility to delete the death penalty step by step”.<sup>27</sup>

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<sup>21</sup> *Ibid.*, pp. 63–71.

<sup>22</sup> Csemegi used this word for criminals who committed a serious crime.

<sup>23</sup> HAJNAL, *op. cit.*, p. 65.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, p. 68.

<sup>26</sup> *Ibid.*, p. 65.

<sup>27</sup> *Ibid.*, p. 71.

He assumed that on the one side there was the irreparable death penalty, which had the effect of determent, while on the other side there were the merciless crimes and the innocent lives of the citizens. It was Csemegi's conviction that the true point of this sanction did not lie on taking away lives, but to save others. He highlighted this viewpoint in his speech: „The delicacy towards murderers cannot turn into insensitivity towards honourable citizens.”<sup>28</sup> As we could see Csemegi emphasised the essence of prevention and the result spoke for itself: the Parliament sustained death penalty. Furthermore if we had a quick look at the judicial praxis after the Csemegi Code came into effect, we could notice that there were just few cases, where the judgement included death penalty. For example between 1896 and 1899 there were no such judgments, but the number of these did not even reach 20 in a year before that period of time. The main reason of this was the restriction of its application, namely only two felonies resulted in death penalty: one was deliberate homicide and the other was attempted murder against the king (according to Ignác Helfy the latter one is a much more serious crime than the previous one, so this should have been sanctioned differently).<sup>29</sup> Besides, the judges had a relatively wide discretionary tether regarding the determination of the extenuating circumstances. So we could rarely find cases where death penalty was actually applied.

## **5. Further criticism of the Csemegi Code**

Beyond the above-mentioned criticism, the opposition questioned nearly every single paragraph of the Csemegi Code, but without any success, because Csemegi proved the critics wrong precisely. According to János Simonfay, member of the opposition, the supplementary punishment that included removal from position and the temporary suspension of political rights was absolutely against the code's remedial intention. In his opinion, it made the procedure of fitting in the society harder after serving the sentence. Csemegi reflected on this as the following: „I think it is fair to say, that the dishonourable, the robbers, the thieves, the rogues and the felons should not be worthy of taking the judge's seat.”<sup>30</sup>

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<sup>28</sup> *Ibid.*

<sup>29</sup> HORVÁTH, *op. cit.*, p. 198.

<sup>30</sup> Képviselőházi napló 1875–1878 (Journal of the House of Representatives 1875–1878), Session 313, 27 November 1877

In a session of the Upper House on February 20, 1878 János Cziráky (*tavernicorum regalium magister*) had budgetary concerns regarding the setting up of the new punitive system of imprisonment. Namely the new criminal code initiated three main forms of punishments: the mentioned death penalty, financial penalty and imprisonment, the latter one had four partitions: penitentiary, state prison, jail and prison. Although Cziráky fully agreed with the new punitive system, he criticised the tremendous amount of money it needed to be set up. Csemegi said that it required time and not just years to switch. He also stipulated that the first steps will be experimental with a low cost and the main goal will be the setting up of these elements step by step.<sup>31</sup> Furthermore the members of the opposition also criticised the low punitive minimum of libel as well as the whole punitive system's complexity. They also claimed that one of the main mistakes of the code was the lack of proper rules regarding the juvenile and the recidivists.<sup>32</sup>

## **6. General evaluation of the Csemegi Code**

To sum up, we could say that the majority of the criticism were based on the difference between the Criminal Code Proposal of 1843 and the Csemegi Code, but the members of the opposition raised their voice against every provision. However, Károly Csemegi and Tivadar Pauler (parliamentary rapporteur) successfully upheld the Proposal, the Parliament accepted that, so the first codified criminal code of civic Hungary came into existence. But we just simply cannot pass by the praising of the Csemegi Code, as even its critics could not. The Code itself was an independent work by Csemegi, as well as the justification with a length of hundreds of pages and all the speeches too. It complied well with the international requirements at that time, it took a really prominent place among the other European jurisdictions' criminal codes.

It went on to become one of the core principles and fundamentals of the new civic Hungarian State, it closed the gap between the country and Western Europe (in the area of criminal law). The French government even translated it and published it in Paris (1895) under the name „Code pénal hongrois des crimes et des délits”. Moreover it was translated in Italian too. In spite of the critics that claimed the Csemegi Code was exclusively based on

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<sup>31</sup> Főrendiházi napló 1875–1878 (Journal of the Upper House 1875–1878), Session 114, 20 February 1878

<sup>32</sup> MEZEY 2007, *op. cit.*, p. 338.



only scientific and law dogmatic theories, the Code actually took the social relations into account. The *nullum crimen sine lege* and *the nulla poena sine lege* principles constrained the judicial legislation, these prospered legal certainty. Interestingly, the posterior socialist criminal law science saw the work as a liberal capitalist, bourgeois code. Nevertheless the Csemegi Code's general part was operative until 1950, while its particular part was until 1961, so three jurist generations learned the mentality of criminal law by the help of the new code.<sup>33</sup>

Finally we could say that the main goal was achieved: a unified and codified criminal code was successfully made in Hungary for the very first time. Csemegi had everything, what a codifier could possibly need: huge legal competency, wide linguistic spectrum, exceptional international legal knowledge and incredible performing skills as well as dedication.

We should lay down that the basis of the criticism was the difference between the Criminal Code Proposal of 1843 and the Csemegi Code. However, the creators of the Proposal in the Hungarian Reform Era did not have a reference point, they could create relatively freely, expressing it better: „the Hungarian Reform Era's intellectual flying, the promising modernization set the creators free”.<sup>34</sup> The Csemegi Code's angularity arose from its ligature beside the principles of the classic criminal law school, so its revision was highly required after just ten years in praxis. As a result of this criminal novels were created, but we should not say that the code failed the test, because it has been applied for more than 70–80 years and it has been a decisive source of criminal law. Károly Csemegi worthily has a place among the greatest characters of Hungarian history of law, he has a great respect ever since.

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<sup>33</sup> HORVÁTH, *op. cit.*, p. 200.

<sup>34</sup> MEZEY, Barna: A büntetőjogi kodifikáció kezdetei Magyarországon [The beginning of the Hungarian codification of criminal law] *Jogtörténeti Szemle*, 2004/1, p. 57.

# **Matija PLAŠĆ: An Attempt to Draft a Croatian Criminal Law – Draft of the 1879 Criminal Code or the so-called Derenčin's Draft**

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## **1. Introduction**

Period of governance of ban Ivan Mažuranić in Croatian history was marked by the significant legislative and reform activities in criminal law, but also in other legal aspects. On November 30, 1879 Marijan Derenčin, head of the royal Croatian–Slavonian–Dalmatian government department for the judiciary, submitted to Mažuranić a report stating that he had made the Draft of the Criminal Code. In the time of creation of the Draft, in force was Austrian Criminal Code on Crimes, Misdemeanors and Contraventions from 1852.

Although it never became law, the Draft is considered as the origin of criminal literature development in Croatia. The reasons for non-appearance in law form can be sought in the fact that in 1880 Mažuranić was departed from the place of the ban and on his place came unionist and the Hungarians inclined Ladislav Pejačević, but also in the fact that Draft was in discordance of the tradition and then state policy. Also critics claim that it was excessively mild in prescribing punishments for offenders.

## **2. Who was Marijan Derenčin?**

Marijan Derenčin was born in Rijeka on September 24, 1836 and died on February 8, 1908. He received his education in Rijeka and Zagreb, and finally earned his doctorate in law and social sciences at the University of Vienna. In the beginning he was practicing law, but after the abolition of absolutism and the introduction of constitutionality into Croatia and Slavonia, and the appearance of anti-Croatian tendencies in Rijeka, he decided to enter politics as a fighter of Croatian national intelligence.

His political life was marked by strong patriotic fervor and emotion. Derenčin was elected for Primors' representative several times, but only in the convening of the Parliament of 1872–1875 he began to act as a speaker and held strong and arduous speeches. Such actions were provided by the support of Croatian parliamentarians, so

soon he gained confidence in drafting legal texts and literature. Derenčin, as a rapporteur of the Judicial Committee in Parliament, criticized the two legislative drafts (on the local courts and on the small claims procedure in front of district courts) which the Croatian government sent to the Parliament for discussion. The consequence of the criticism was changing those drafts, and the new ones were made by Derenčin itself. After that, he came to the position of the head of the department for the judiciary, where he remained for seven years and had considerable successes. His legislative activity was closely aligned with the needs of people and the views of legal science, so his proposals often came to support. Derenčin significantly contributed to Croatian criminal legislation on several occasions and the most important was creation of the Draft of the Criminal Code in 1879.<sup>1</sup>

### **3. Draft Criminal Code of the 1879**

On November 30, 1879, Marijan Derenčin filed a report to Ivan Mažuranić, stating that he had drafted the Criminal Code. This document suggested significant changes to the existing criminal legislation. By comparing the Draft with the fundamental foundations of contemporary criminal law, it can be concluded that the Draft was a modern document, not only from the aspect of their time, but also from present point of view. Derenčin explicitly stated that no legislator should ignore the results of science, which is indeed a modern and unambiguous standpoint. His changes of the Criminal Code were based on the principle of strict justice coupled with humanity's request. Derenčin also takes into consideration culture and moral understanding, as well as virtues and shortcomings of Croatian nation. At the same time, he shows an extraordinarily comparative knowledge of the criminal law of other states. For each legal article in the Draft he gives the reasoning with a comparative view. Also, he was careful not to break the centuries-old continuity of Austrian legislation. The Draft consisted of 422 Articles: 110 incorporated in the general and 312 in the special part of the criminal law.<sup>2</sup>

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<sup>1</sup> VRBANIĆ, Fran: Marijan Derenčin (nekrolog) [Marijan Derenčin (necrology)], *Ljetopis Jugoslavenske akademije znanosti i umjetnosti za godinu 1908.*, vol. 23, Zagreb, 1909, pp. 140–163.

<sup>2</sup> BRKIĆ, Branko: Uz stodvadesettreću godišnjicu Osnova Kaznenog zakona o zločinstvih i prijestupcih za Kraljevinu Hrvatsku i Slavoniju [On the occasion of the one hundred and twenty-third anniversary of the Draft Criminal Code on Crimes and Misdemeanors for Kingdom Croatia and Slavonia], *Hrvatska pravna revija*, vol. 3, no. 1, 2003, pp. 1–3.

### 3.1. The provisions of the General Part of the Draft

It can be easily noticed that punishments in the Draft of 1879 were much less severe than those prescribed in the former Austrian Criminal Code of 1852, which takes the view that the purpose of punishment is to improve the criminals and not eliminate them from society with the aim of obtaining respect for the law in the interest of the public order. In this context, Derenčin's attitude toward the death penalty as the most severe form of punishment is also of big importance. Well, he opposes to the death sentence and considers that it is „severe, unjust and irreparable, but he acknowledges the national consciousness that accepts the death penalty and that the legislator should not go against that common-sense point of view”.<sup>3</sup> In this regard, the death penalty is prescribed only for three offenses (high treason, murder with deliberate intent, and the robbery where murder has been committed), and it is executed by hanging.<sup>4</sup>

The principle of legality is contained in the first Articles. Thus, in Article 1, it is stated that „crimes and misdemeanors are only those acts explicitly prescribed by law as crimes or misdemeanors”,<sup>5</sup> and Article 2 contains the principle of legality of punishment and the principle of *lex mitior*, i.e. the principle of application of the most lenient law for the perpetrator.

The principle of culpability is contained in Article 17, but it is not consistently implemented because according to contemporary law a perpetrator is culpable of a criminal offence if at the time of its commission he is mentally capable and acts with criminal intention. Contraventions committed by negligence were punishable exceptionally and only when the law provided that negligence suffices to establish an element of an offense. Derenčin basically states that the offense is not punishable „when someone has committed crime in the unconscious state, or when his mental capacity was excluded or disturbed so that he could not exercise control over his will”.<sup>6</sup>

It is important to point out that Derenčin did not provide in his Draft any mitigating or aggravating circumstances due to immense multitude of circumstances that should be

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<sup>3</sup> *Ibid.*, p. 9.

<sup>4</sup> *Ibid.*, p. 6.

<sup>5</sup> Osnova novoga kaznenoga zakonika o zločinstvima i prestupcima za Kraljevine Hrvatsku i Slavoniju uz obrazloženje [Draft of a new Criminal Code on Crimes and Misdemeanors for Kingdom Croatia and Slavonia, including commentary], Tiskara "Narodnih Novina", Zagreb, 1879, Art. 1, p. 1.

<sup>6</sup> *Ibid.*, Art. 17, p. 5.

taken into consideration, so that the legislator cannot even approximate them. Because of that, evaluation of mitigating or aggravating circumstances was left to court practice. In the explanation of its Draft, Derenčin explicitly excludes analogy and extensive interpretation of the law, and the limitation of criminal law enforcement is reflected in his thesis that only those offenses that offend public and private security may be imposed by the criminal law because they distort the rule of law in the state.

The penalty of imprisonment with hard labor was prescribed for life or for up to twenty years. In the execution of imprisonment sentence so-called Irish progressive system was applied, which consisted of three phases: 1) a period of solitary confinement, 2) a period of congregate work, and 3) a period in "intermediate prisons". The final stage was conditional release into the community after serving at least three-quarters of the sentence. Although the Draft does not explicitly mention security measures, we can recognize some of them in so-called "additional penalties" (e.g. seizure of objects, prohibition of vocation, court order, exile from the place where the crime was committed or particular kingdom in the Monarchy), but not from the whole Monarchy regarding their own citizens. The additional penalties connected with the death penalty were loss of office and the suspension of political rights. Also, while serving a prison sentence convicts were unable to hold public office, their profession or to exercise political rights.<sup>7</sup>

The Draft provides a special regime for juveniles and in that sense is very modern because according to Article 24, juveniles aged 12 to 16 years „can be sentenced to be placed in a House of Correction in which they should stay until they show that they have improved but never over 20 years”.<sup>8</sup> It does not contain the definition of omission (same situation in Austrian and Hungarian criminal law) and does not mention and define the intention because Derenčin considers this to be a scientific term that does not have place in law. But the Draft gives an acceptable definition of the statute of limitation for criminal prosecution. In his explanation Derenčin states that by the statute of limitation „criminal act loses the meaning of the violation of legal consciousness and becomes a historical act”.<sup>9</sup>

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<sup>7</sup> BRKIĆ, *op. cit.*, pp. 6–7.

<sup>8</sup> Osnova novoga kaznenoga zakonika o zločinstvima i prestupcima za Kraljevine Hrvatsku i Slavoniju uz obrazloženje, *op. cit.*, Art. 24, p. 7.

<sup>9</sup> BRKIĆ, *op. cit.*, p. 9.

Derenčin's view of punishable behavior is represented by trichotomy of criminal offences whereby the most severe acts of crime are the direct and intentional objectively serious violations of rights. Less violation is defined as immediate and targeted, but objectively minor injuries, as well as immediate and cruel violations of rights (*culpa* is equalized with negligence). It also provides contraventions as indirect violations of rights governed by a special law which is a difference in relation to the Austrian Criminal Code of 1852.<sup>10</sup>

### **3.2. The provisions of the Special Part of the Draft**

Crimes of rape, insult, and defamation are briefly and clearly defined. The Draft also changed the definition of the crime of manslaughter committed in a state of intense excitement. Many of the punishments were much milder in relation to the Austrian Criminal Code of 1852. For example, the misdemeanor of lese majesty, i.e. an offense that violates the dignity of a ruler, was punishable by up to two years of prison and the loss of official position. Also, the misdemeanor of insulting a member of the royal house was punishable by prison up to a one year.<sup>11</sup> That was much less severe in relation to the Austrian Criminal Code of 1852, which imposed a severe imprisonment up to five years. The slight deviation from then contemporary legislation exists in the further punishment of the crime of blasphemy for which the Draft prescribed imprisonment with hard labor for up to five years.<sup>12</sup> By defining a criminal offense of fraud Derenčin gives following explanation: „Fraud is punishable only if the criminal action was committed in a way that a victim can only defend himself with particular caution. The prerequisite of fraud is fraudulent behavior directed towards property rights, and not caused damage because this can be subsumed under offence of malicious mischief.”<sup>13</sup>

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<sup>10</sup> BRKIĆ, *op. cit.*, pp. 5–8.

<sup>11</sup> Osnova novoga kaznenoga zakonika o zločinstvih i prestupcih za Kraljevine Hrvatsku i Slavoniju uz obrazloženje, *op. cit.*, Art. 123-124, pp. 247–249.

<sup>12</sup> *Ibid.*, Art. 175, pp. 264–265.

<sup>13</sup> BRKIĆ, *op. cit.*, p. 9.

#### **4. Conclusion**

Overall, it should be said that it is pity that Derenčin's Draft never gained legal force. The reason for this assertion is certainly the fact that the advanced views set out in the Draft were then in line with all modern trends and aligned with the ideas and systems of other states. Ultimately, they made significant progress in the then criminal legislation. The excellence of Derenčin's Draft is also visible in the criticism of significant domestic and foreign lawyers and scientists such as Makanec, Ružić, Brussa, Ullman etc. Today we can be proud on this Draft and despite the fact that it has never received legal form we can assert it as one of the very important achievements in our legal history. We can also learn that legislative action should be taken with caution and with great care, and that any rushing and superficiality should be avoided in order to overcome all shortcomings and adverse consequences that may result. Marijan Derenčin has left a deep mark in Croatian legal history, and it is up to us to preserve his legacy and move it further.

# **Patrik SZABÓ: The Philosophical and Legal Perspectives of Capital Punishment**

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## **1. Introduction**

Throughout the legal history death penalty has always had a central role. During the ancient times it was used as a usual way of punishment (*poena ordinaria*) and this conception did not change until the era of enlightenment, during which the most influential philosophers and legal thinkers unexceptionally dealt with the institution of capital punishment. Due to their works the conception of death penalty basically began to change in the 18<sup>th</sup> century. Unfortunately, this development came to a halt because of the World War I, but after 1945 mainly in Western Europe it, arm in arm with the acceptance of human rights, led to the appearance of the abolitionist movements. Partly as a result of their campaign, more and more European governments made a decision to finally ban the application of death penalty. Nevertheless, the road that led to the abolition of death penalty was stoned by heavy political, ethical, philosophical and legal debates that – especially focusing on the Hungarian regulation of capital punishment – this essay aims to summarize.

## **2. Philosophical background**

### **2.1. The ancient philosophers**

Certainly, death penalty used to be an orthodox tool of sanctioning in several ancient societies before the ancient Greek and Roman but as a result of the conception of the enlightenment the thoughts of the antique Greek philosophers influenced the thinkers of the 19<sup>th</sup> the most.

The first school to be mentioned is the one, named after its master: Pythagoras, who lived around the 6<sup>th</sup> century B.C.<sup>1</sup> According to his followers, all perpetrators should

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<sup>1</sup> RUSSEL, Bertrand: A nyugati filozófia története [A history of Western Philosophy]. Budapest, 1996, Göncöl Kiadó, p. 44.



get equal punishment to the crime they committed.<sup>2</sup> The members of this school basically supported the idea of the so-called *lex talionis*, which means that the offender must suffer the same inconveniences he caused to the offended. As a consequence of this mentality, the only way they found just, was to execute someone, who committed manslaughter, because according to them, this was the only way to punish someone proportionally.

One of the well-known leaders of the sophist school was Protagoras who supposedly lived in the 5<sup>th</sup> century B.C.<sup>3</sup> According to his ideas the punishment of those who committed a crime has to be future-oriented and its main point is to avoid committing another crime. This means, that the ancient sophistical thinker found both special and general prevention to be an essential aim of punishment, because he taught: punishment is only beneficial if it prevents both the former offender and the other members of society to commit a crime.<sup>4</sup>

The thoughts of Protagoras are quite similar to Plato's. Plato who mainly operated in the 4<sup>th</sup> century B.C. worded in his iconic work: *The Republic*, that the optimal state should be ruled by a philosopher king. In his same work he claimed, that the monarch in case of necessity should be allowed to rule by ignoring the law because it cannot always ensure the proper answer to a new problem. Therefore, he insisted that the monarch should deliberate in each case, whether he wanted capital punishment to be applied or not. Of course Plato saw the weak points of his reasoning. He insisted that a philosopher king can only be wise, selfless and driven by virtue thus it is almost impossible that the jurisdiction made by him could turn into despotism.

However, Plato alike the sophists thought that the point of law was to teach and punish. He found the optimal punishment to be preventive. Moreover, he asserted that punishment had to be remedial, which basically means that it also has to aim to try to reintegrate the offender to the normal social life, except it is impossible because he is obviously incorrigible.<sup>5</sup> In the latter case, Plato stated, that the offender had to be eliminated from the society, under which he probably meant the application of capital

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<sup>2</sup> TÓTH J., Zoltán: Halálbüntetés Pro és Contra [Death penalty pro and contra]. Budapest, HVG-ORAC, 2012, p. 17.

<sup>3</sup> POSTER, Carol: Protagoras. <https://www.iep.utm.edu/protagor/#H1> [Access on April 27, 2018]

<sup>4</sup> TÓTH J., Zoltán: A halálbüntetés az ókorban [Death penalty in the ancient times]. *Jogelméleti Szemle*, 2004/4, p. 8.

<sup>5</sup> *Ibid.*, pp. 14–15.

punishment. It can be a point of interest that he claimed death penalty to be unconditionally used in case of treason or committing a crime against God or the state. He only aimed to make some sorts of manslaughter or its attempt followed by an execution. Among these varieties of murder was when someone as a child or a slave managed or tried to kill one of his parents or his lords.<sup>6</sup>

His disciple, Aristotle mainly shared his opinion about above-mentioned, but he even added that punishment had to be proportional, which means that the offender has to suffer the same drawback he caused to the offended. On the other hand, Aristotle insisted that apart from the correction or elimination of criminals, the most determining goal of punishment was to make the offender deprived from the illegal and unjust advantage he gained by committing a crime.

## **2.2. The Enlightenment**

The era of Enlightenment began in the Western European countries in the 18<sup>th</sup> century. The ideas of Enlightenment which first stroke a root in England and France, were fundamentally inspired by the antique civilization and for this reason, as the study is also going to prove, the upper mentioned theories of the ancient philosophers became a part of the enlightened thinkers' thesis.

Hugo Grotius the forerunner of the Enlightenment and the well-known lawyer of the 18<sup>th</sup> century made a distinction between three standards of law: 1) the divine law; 2) natural law, and 3) positive law. According to him, the standard of the divine law contains only those norms that can only be enforced by God, therefore capital punishment – as opposed to the medieval concept – can only be defined within the frames of the latter two.<sup>7</sup>

Answering the question: which aspects the applier of law shall take into consideration before taking any sanctions, Grotius claimed that the judge had to examine whether the delinquent deserved punishment or his action had to be sanctioned.<sup>8</sup> Moreover, a judge has to know which sanction is the most effective and proper. To be able

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<sup>6</sup> *Ibid.*, p. 16.

<sup>7</sup> *Ibid.*, p. 54.

<sup>8</sup> *Ibid.*, p. 57.

to define the latter criteria, the judge has to consider the advantage he hopes as a result of taking the sanction which can only be a positive and beneficial goal. Regarding his thoughts about the significance of prevention, the influence of Plato is obvious because Grotius reckoned that criminals beyond recovery were incapable of enjoying life because they had no sense of justice, therefore their life was misery, consequently the best the society could do for them is to execute these people.<sup>9</sup>

Montesquieu, the famous French jurisconsult, emphasized several meaningful problems in connection with death penalty. He was among the first to state that tyrannous procedures can be quite counterproductive because the stricter the punishment the less effective it is and as a consequence the more insecure the legal and the social system is, which consequently means that the strictness of the punishment is not in direct proportion to the level of prevention and the decrease in the number of crimes.<sup>10</sup> Even though, Montesquieu did not claim the abolishment of capital punishment, he contrariwise worded that it was acceptable in cases of crimes committed against life, "corporal soundness" and wealth, when no punishment of property can be applied.

Despite, Rousseau and John Locke came from different countries and were not the contemporaries of each other, both of them asserted the social contract into the centre of their theories.<sup>11</sup> The fundamental similarities between their concepts were that both of them insisted that criminals, especially murderers make nothing of the social contract and place themselves above the law. Even though the members of the society could not transfer to the state their right to take away the life of other people, because this right is not granted for any of them, in case of the need for the society's own protection, the state has the right to apply death penalty because this is the only way the community of the citizens can be sheltered from actions that are harmful to it.

Holbach, the French encyclopaedist was one of the first to state that criminals are produced by the society. He also raised his voice against qualified capital punishment, because he found cruelty of these procedures absolutely unnecessary if the convict died

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<sup>9</sup> *Ibid.*, p. 59.

<sup>10</sup> *Ibid.*, p. 74.

<sup>11</sup> *Ibid.*, p. 66.

anyway. He also alleged that death penalty does not have more deterring effect than any other way of punishment, but it creates sympathy towards the one who were executed.<sup>12</sup>

### 2.3. Cesare Beccaria

Cesare Beccaria was an Italian jurist, criminologist, philosopher, and politician, who mainly operated in the 18<sup>th</sup> century.<sup>13</sup> In his main work: "On Crimes and Punishments" (*Dei delitti e delle pene*) he summarized his theories on the principles of criminology and criminal law.

Among others, Beccaria consistently emphasized the significance of the *nullum crimen sine lege* and *nulla poena sine lege* principles, the presumption of innocence and the requirement of publicity.<sup>14</sup> Alike Plato, he reckoned that the point of punishment was prevention that had to be necessary and proportional, which means that an effective but the most benign way of punishment has to be taken.<sup>15</sup> One of the reasons Beccaria can be called a pioneer for is that he was the first to declare that the deterring effect of a sanction depends not on the sort or the dignity but its inevitability,<sup>16</sup> under which he meant the probability that sanction would be realised in case of breaking the law.

Considering capital punishment, he mainly specified and completed his above-mentioned thesis. He argued that the legislature had to make a distinction between different kind of murders, and only after this diversification it was possible to assign a punishment to the crime. He even wanted sanctions to be milder, faster and more surely realised because in conjunction with a more efficient mapping of criminality he claimed it to be a guarantee for the inevitability of the punishment. According to him, executions were completely clueless and absolutely not deterring,<sup>17</sup> because they only let people fulfil their sadist desires and on the contrary to its goal it only made the audience sympathize

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<sup>12</sup> *Ibid.*, p. 81.

<sup>13</sup> Internet Encyclopedia of Philosophy: Cesare Beccaria. <https://www.iep.utm.edu/beccaria/> [Acces April 27, 2018]

<sup>14</sup> *Ibid.*, p. 90.

<sup>15</sup> *Ibid.*, pp. 95–96.

<sup>16</sup> BECCARIA, Cesare: An Essay on Crimes and Punishments [http://files.libertyfund.org/files/2193/Beccaria\\_1476\\_EBk\\_v6.0.pdf](http://files.libertyfund.org/files/2193/Beccaria_1476_EBk_v6.0.pdf) [Acces April 27, 2018]

<sup>17</sup> PACZOLAY, Péter: A Dei delitti e delle pene államelméleti kérdései [Questions in connection with the theory of state in Dei delitti e delle pene]. In: TÓTH J., Zoltán: 250 éves a Dei delitti e delle pene [Dei delitti e delle pene is 250 years old]. Budapest, 2015, Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, p. 54.

with the convict, which feeling was stronger than the deterring effect of the procedure.<sup>18</sup> As a consequence, he was almost completely against death penalty because, apart from the above-mentioned arguments, he, just like Rousseau and John Locke, did not find it conform to the social contract. Therefore, he recommended using lifelong penal service instead, because it harmonized with the social contract, did not endangered the society so much and made people more horrified, which meant a higher level of general prevention.

Drawing the conclusion, the most significant enlightened thinkers were quite influenced by the ancient philosophers, especially Plato. These thinkers were the first to question the point of death penalty and suggested new methods of punishment. Due to their reformer ideas, they not only had an effect on criminal sciences of their homeland but the whole continent including Hungary.

### **3. The history of capital punishment in Hungary**

#### **3.1. The Reform Era**

Even though the Hungarian Jacobins took sides in the question of death penalty, the first person of public who indeed had an effect on this debate was Bertalan Szemere. Szemere summed up his arguments against death penalty in his well-known work: „On Punishment and especially on capital punishment”. On the one hand, he was against the previously mentioned legal institution because of natural law arguments, according to which „life is inviolable, and it is a sin to kill”.<sup>19</sup> On the other hand, he disapproved death penalty because of practical considerations. Szemere, just like the above-mentioned philosophers, stated that this way of punishment was completely useless, incorrigible and had precarious effect.<sup>20</sup>

After the suggestion in 1829 could not come into force, the Parliament discussed another Proposal of the Criminal Code in 1843 that was one of the most progressive ones. It was, among others, influenced by the ideas of Bertalan Szemere. The heaviest debate was about the abolition of death penalty, but the suggestion aiming to ensure equality

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<sup>18</sup> *Ibid.*, p. 101.

<sup>19</sup> SZEMERE, Bertalan: A büntetésekről s különösebben a halálbüntetésről [On punishments especially on capital punishment]. p. 122. [http://mtdaportal.extra.hu/books/a\\_buntetesrol\\_s\\_kulonosebben.pdf](http://mtdaportal.extra.hu/books/a_buntetesrol_s_kulonosebben.pdf) [Access April 27, 2018]

<sup>20</sup> HALMAI, Gábor – TÓTH GÁBOR, Attila: Emberi Jogok [Human Rights]. Budapest, 2003, Osiris Kiadó, p. 322

before the law and the basic rights of freedom, were not accepted by the Upper House because of political reasons, therefore the Hungarians had to wait until 1878, when the first Hungarian Criminal Code, the Csemegi Code got codified.

### **3.2. Act 5 of 1878 – The Csemegi Code**

The Hungarian jurisprudence was absolutely ready for the construction of the codex. After the suppression of the Revolution and War of Independence of 1848, the Austrian Criminal Code came into force in Hungary, based on which the political retribution took place. The Code was followed by the "Provisional Judicial Regulations" in 1861.<sup>21</sup> It made the Hungarians turn back to the Hungarian law before the civic conversion, and it made plenty of overdue legal institutions come into force again, thus it was considered even by the counsellors in Vienna as a shamble full of inconsistencies.<sup>22</sup> As a consequence, the Hungarian courts began to use the well-known coursebook of Tivadar Pauler as a Code, that clearly implicated the need for a constant domestic Criminal Code, which Károly Csemegi managed to create on his own in 1878, and stepped into force as Act 5 of 1878 which got named after its creator Csemegi Code and was used as the Criminal Code of Hungary for 70 years.

The Code encompassed death penalty, but it could only be used as a sanction in case of the most serious crimes. According to Article 278 and 126 of the Code these crimes were malicious murder and the attempt to murder the monarch. Nonetheless, the king could have mercy on criminals who had committed the above-mentioned crimes. It is important to note, that according to the Code, if the mitigating factors exceeded the aggravating factors, instead of capital punishment, the sanction of lifelong imprisonment had to be used.<sup>23</sup> The period of limitation for crimes threatened with death penalty was 20 years. This kind of punishment could only be used against persons who were older than 20 years old when they committed the crime, and hanging was the only way it could be

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<sup>21</sup> MEZEY, Barna: Magyar jogtörténet [Hungarian legal history]. Budapest, 2007, Osiris Kiadó, p. 327.

<sup>22</sup> RADY, Marthyn: Customary Law in Hungary. Oxford, 2015, Oxford University Press, p. 228.

<sup>23</sup> TÓTH J., Zoltán: A halálbüntetés intézményének egyetemes és magyarországi jogtörténete [The universal and Hungarian legal history of capital punishment]. Budapest, 2010, Századvég Kiadó, p. 246.

implemented. Fortunately, this institution was not often used by the courts, because from 1881 to 1889 only two executions were implemented a year in average.<sup>24</sup>

### **3.3. World War I and II**

Considering death penalty, the turn of the century was a quite calm period because this kind of sanction was hardly ever used, and in most cases the king had mercy on those who deserved death according to the Criminal Code's rules. This peaceful period was interrupted by the preparation for World War I, which basically began in the 1910's, when court-martials got institutionalized and courts got allowed to establish martial law in case of the most serious crimes such as riot.

#### **3.3.1. The Soviet Republic**

In 1919 the Dictatorship of the Proletariat got declared and the time of The Soviet Republic of Hungary officially began. In the five months of the republic "Revolutionary Courthouses" were settled, which were made up of a president and two members, all of whom were nominated by the "Revolutionary Council of Government". These judges had no special qualification of law. The only requirement they had to fulfil was to be loyal to the ruling Party. The courthouses operated as instant trials that could apply capital punishment as a response to a wide range of crimes included in the Regulation of the "Revolutionary Council of Government" that added that in case of "urgent need" courthouses were even allowed to proceed in cases not mentioned in the Regulation. This meant in practice that death penalty could be used whenever and against whoever politicians wanted it to be used.

#### **3.3.2. The Horthy era**

The historical period between 1920 and 1944, as it is called by the Hungarians the Horthy era, brought numerous changes in connection with capital punishment. The era basically began with the impeachment of the Soviet. To accomplish this goal, a regulation of the Prime Minister declared that processes initiated during the previous regime and the

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<sup>24</sup> *Ibid.*, p. 247.

verdicts made by the above-mentioned courthouses were invalid.<sup>25</sup> Moreover, the legal retribution basically began with the reestablishment of those courthouses. The only difference between the latter and the above-mentioned was that the courthouses of the Horthy era were made up of councils having five members, but they were also instant trials, obviously aiming to convict those who were related to the Soviet Republic.

However, processes of martial law became significant only in 1931, when Szilveszter Matuska carried out his assassination and blew up the viaduct at Biatorbágy while the train from Budapest to Vienna was crossing. Except one carriage the whole train fell off the bridge and 22 people died. The department of investigation found a letter, based on which they presumed that the attack was carried out in the name of an Eastern European communist conspiracy.<sup>26</sup> After the attack, the Hungarian government declared martial law, and tried to capture everyone related to the attack. Of course, the attack was a good pretention to escalate the fight against the left-wing parties. Therefore, the definition of acts against authorities got expanded and several citizens were executed.

The next important stage in the regulation of death penalty was Act 2 of 1939 on National Defence. The Act broadened the possibilities to apply death penalty because it declared the unrestricted right of the government to order instant trials, which the Act even authorized to extend the force of any of the laws referring to the time of war. According to the Act, capital punishment could be applied in case of any violence committed against the National Defence, which meant in practice, that someone could have been executed due to corruption of office.<sup>27</sup>

### **3.3.3. The transition after World War II**

The Horthy era collapsed on 16 October 1944 as the fascists took over control. Their ruling did not last too long, because it ended in the following year's March, after which the

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<sup>25</sup> *Ibid.*, p. 263.

<sup>26</sup> TARJÁN M., Tamás: Matuska Szilveszter felrobbantja a Biatorbágyi viaduktot [Szilveszter Matuska explodes the viaduct in Biatorbágy] [http://www.rubicon.hu/magyar/oldalak/1931\\_szeptember\\_13\\_matuska\\_szilveszter\\_felrobbantja\\_a\\_biatorbagy\\_i\\_viaduktot/](http://www.rubicon.hu/magyar/oldalak/1931_szeptember_13_matuska_szilveszter_felrobbantja_a_biatorbagy_i_viaduktot/) [Acces April 27, 2018]

<sup>27</sup> TÓTH J., Zoltán: A halálbüntetés szabályozása a Horthy-korszakban és a II. világháború éveiben [The regulation of capital punishment during the Horthy era and World War II] *Jogtörténeti Szemle*, 2010/3, p. 54.



National Assembly tried to consolidate and democratize the country. The Smallholders' Party won the election and the government led by Zoltán Tildy began to operate.

Based on the order No. 81/1945 M. E. (of the Prime Minister) issued on 5 February 1945 establishing Courts of People, the court was to call the war criminals to an account, including the fascist and those who tried to baffle the peace talk or those who brutalized prisoners of war. The courts were made up of a council, the 5 members of which were delegated by the political parties of the Hungarian National Independence Front. Next to the council members, a professional judge also took part in the process, but he only had an advisory capacity. The council made its verdict – in which it could declare the culprit to be guilty – with single majority, against which the convict could only appeal to National Council of Lay Judges (Népbírók Országos Tanácsa) that was also politically biased.<sup>28</sup> This makes it completely obvious that the government used the sanction of death penalty as a tool to realise their political will, against which practically no one could do anything.

#### **4. The socialist era**

After the Hungarian Workers' Party gradually took over control in 1948 a completely new era of the Hungarian history began. This period of socialism lasted until the collapse of the Soviet Union in 1990, and the centre of it was the unity of power having a quite important effect both on the Hungarian constitutionalism and regulation of capital punishment.

##### **4.1. Act 2 of 1950 on the General Part of the Criminal Code**

After 1945 the government reckoned that a Code of a new approach is needed. Therefore, they created the General Part of the Criminal Code that changed the general part of the Csemegi Code. The ministerial justification of the Act recognized that capital punishment was principally wrong and once would be vanished from the legal system. However, the justification insisted that it was currently needed because of the society's state of development did not reach the level to let the legislature abolish death penalty. The limitation period of crimes threatened with death penalty was 15 years. This punishment could only be taken against those who were older than 20 years old when committing the

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<sup>28</sup> TÓTH J., Zoltán: A halálbüntetés intézményének egyetemes és magyarországi jogtörténete [The universal and Hungarian legal history of capital punishment], p. 279.

crime, because the strictest punishment used against criminals who were older than 18 years old but younger than 20 was lifelong imprisonment, and in case of those children who were younger than 18 years old the highest limit of imprisonment was 5 years.<sup>29</sup> It is also important to note, that executions had to be implemented behind closed doors and they could only be carried out by hanging, but if this was not possible, the death penalty was executed by shooting.

#### **4.2. Consequences of the Revolution and War of Independence in 1956**

After the Revolution and War of Independence in 1956 expedited procedures became part of jurisdiction again. The conditions of these procedures were regulated by the Decree-law 4 of 1957 declaring that these procedures could only be initiated by the public prosecutor. After that the taking of evidence was needed but the process was previously conducted in front of a special judicial panel, the aim of which was to charge the supporters of the revolution.<sup>30</sup>

The procedure of martial law also got transformed. The number of the members of the judicial panel was three, and one of them was a professional judge without whose agreement the panel could not pronounce death penalty because unanimous majority was needed to dismiss the application for mercy. If it happened, the convict still had the chance to appeal to the "Presidential Council". It can also be a point of interest that altogether seventy people were convicted in this procedure out of whom twenty-six got executed.<sup>31</sup>

To sum it up, jurisdiction after the revolution mainly aimed to take the supporters of the revolution to an account, that is why it made nothing of the constitutional principles and procedural guaranties and was subordinated to an undoubtable political will.

#### **4.3. Act 5 of 1961**

Act 5 of 1961, the Criminal Code included death penalty, but it was no absolute but rather a relative sanction because the court always had a choice not to use it. The ministerial

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<sup>29</sup> *Ibid.*, pp. 290–291.

<sup>30</sup> *Ibid.*, p. 2931.

<sup>31</sup> *Ibid.*, p. 296.

justification of the institution was quite similar to the one worded in connection with Act 2 of 1950, because the minister still insisted that death penalty is something wrong but needed. According to the Criminal Code capital punishment could only be used against those who were elder than 20 years old when they broke the law and committed a crime threatened with 10 to 15 years lasting imprisonment. Another important precondition of applying death penalty was that the goal of punishment could only be reached through executing the convict and the judge also had to examine whether the mitigating factors exceeded the aggravating factors or not. Moreover, the Code imposed death penalty for 31 crimes. Among these factual situations were crimes against humanity or the state, military offense and even eight of the common criminal offenses that – according to the legislature – were the most dangerous crimes. The number of crimes threatened with capital punishment got decreased by the Act 5 of 1971 to twenty-six that the next Criminal Code also regulated.<sup>32</sup>

#### **4.4. Act 4 of 1978**

Act 4 of 1978 was in force until the current Criminal Code of Hungary (Act 100 of 2012) derogated it. The Code had a quite important role in the Hungarian legal history because, for the reason of the changing of system, the legislature had to make it fit to the completely new social and legal system in which the Hungarian Constitutional Court also played a very important role.

The Code threatened 26 crimes with capital punishment, and similarly to Act 5 of 1961 the ministerial justification worded almost the same about death penalty that could only be used against those who had already turned twenty years old at the time of the criminal offense. The limitation period was just the same as in the above-mentioned Act except in cases of war crimes and crimes against humanity. Even though, there were some similarities between the regulations of the two Acts, the following differences between them were more relevant. The new Criminal Code defined the 26 crimes threatened with death penalty in a more punctual and strict construction, so these definitions had to be more precisely interpreted than before, which made their sanctioning not as discretionary as before. Another important distinction was that the Code defined capital punishment as

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<sup>32</sup> *Ibid.*, p. 305.

an alternative punishment, but it did not concretise the sanction must have had to be used instead, which practically meant that the judge could almost reduce penalty without any restriction.

Considering the formal rules of capital punishment, it has to be noted that executions just as before had to be implemented behind closed doors, and it was executed by hanging or shooting. After the convict was sentenced to death, he had to spend the rest of his life on death row where he could meet his relatives and were allowed to make a valid written provisional will.

## **5. Abolition of death penalty**

As previously mentioned, even in Hungary the first arguments to abolish death penalty got worded more than 200 years ago, but this progress peaked after the World War II in Western Europe and after the collapse of the Soviet Union in Eastern Europe.

### **5.1. Arguments against capital punishment**

The first and almost most important argument against capital punishment is about its deterring effect that is heavily correlated to general and special prevention. The upper mentioned philosophers refuted the argument of the so-called retentionists, according to whom there was a direct proportion between the severity and the deterring effect of the sanction. On the other hand, the abolitionists argue, that the motive of killing is so hard that no one thinks about the sanction when committing a murder.<sup>33</sup>

Moreover, it is out of question that death penalty is an inhuman way of punishing.<sup>34</sup> Firstly, because of the physical pain it causes and the implementation also carries the possibility of failure in case of which the convict has to suffer a lot before dying.<sup>35</sup> A great example for this was the case of Alva Campbell, an American citizen who was sentenced to death, but inside the death chamber the prison officers spent more than an hour to find a

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<sup>33</sup> TÓTH J., Zoltán: A halálbüntetés története, filozófiája és kortárs jogelméleti kérdései. [History of capital punishment, its philosophy and contemporary question of legal theory]. [https://www.ajk.elte.hu/file/AJKDI\\_TohtZoltan\\_tez.pdf](https://www.ajk.elte.hu/file/AJKDI_TohtZoltan_tez.pdf) [Access April 29, 2018]

<sup>34</sup> Társaság az Alapjogokért: A TASZ a halálbüntetésről. [TASZ on death penalty] <https://tasz.hu/files/tasz/imce/halalbunt2.pdf> [Access April 29, 2018]

<sup>35</sup> KRAMER, Matthew H.: The Ethics of Capital Punishment, Oxford, 2013, Oxford University Press, p. 213.

vein in which they could have injected the lethal fluid. The officers finally gave up.<sup>36</sup> In addition, the disapprovers of the institution claim, that death penalty is especially cruel because after being sentenced to death until being executed, the time for the convict ends because of the psychological situation full of anxiety and fear he gets into.

Another essential aspect of capital punishment to mention is the so-called "Justizmord" which means the phenomenon of executing people whom, as it turned out later, were completely innocent. This aspect is mainly related to the irreversibility of executing someone.<sup>37</sup> As it turned out, more than a hundred people were executed innocently only in the United States. But this number is only a part of the truth, the authorities will never be able to find out the exact data.

Last but not least, retentionist argue that death penalty is cheaper than financing lifelong imprisonment. In opposition, the abolitionists claim death penalty to be more expensive because of the whole system the state has to maintain to manage the implementation of the sanction. On the other hand, abolitionist believe that in a civilized country it doesn't matter how much does a life cost, because the state cannot take away any human life in the hope of economic advantages.

## **5.2. Abolition of death penalty in Hungary**

After the changing of system, the transformation of the social, economic and legal system of Hungary began. As a result of this change the Abolitionist League started a campaign and turned to the Hungarian Constitutional Court demanding to declare that death penalty was unconstitutional.

### **5.2.1. Decision No. 23 of 1990 of the Constitutional Court**

The competencies of the Constitutional Court were based on the institution of the so-called *actio popularis* that allowed the Hungarian citizens to hand in a constitutional

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<sup>36</sup> Capital punishment deserves a quick death. *The New York Times*, 31 December 2017 <https://www.nytimes.com/2017/12/31/opinion/capital-punishment-death-penalty.html> [Access April 29, 2018]

<sup>37</sup> Amnesty International: Death Penalty. <https://www.amnesty.org/en/what-we-do/death-penalty/> [Access April 29, 2018]

complaint and ask for the revision of the acts they claimed to be unconstitutional.<sup>38</sup> The Abolitionist League exercised this right of theirs and the Constitutional Court had to make a decision whether the death penalty fit to the freshly amended Constitution or not.

In its decision the Constitutional Court found death penalty unconstitutional and ordered the abolition of the referring parts of the Criminal Code. The Constitutional Court in the explanation of its decision No. 23/1990 expressed that there was a contradiction between the Article 54 (1) and 8 (4). The former declared: „In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights”; whereas the latter worded the following: „In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights.” According to the argument of the Court, the Article 8 (4) was itself not enough to define capital punishment unconstitutional because of the "arbitrarily denied" phrase of Article 54 (1). Consequently, the task of the Court was to interpret the meaning of the previously cited phrase, what they did the following.

The Constitutional Court declared that apart from regarding the test of necessity and proportionality, capital punishment is against the prohibition to restrict the basic meaning and contents of fundamental rights, because it not only restricts but irreversibly terminates the right to human dignity and to life. The reason for this is that the right to human dignity and the right to life cannot be separated because it is impossible not to violate one without violating the other, because the right to human dignity can only have a meaning in the frames of life. Therefore, the Court invalidated the referring article of the Penal Code and requested the Parliament to remedy the constitutional incoherence.

### **5.2.2. The parallel explanation of László Sólyom**

László Sólyom, the former President of the Constitutional Court worded his arguments in a "parallel explanation", which makes the explanation described above better understandable. Sólyom insisted that human dignity is an inherent right of human beings and therefore it cannot be separated from the right to life, because this unity makes

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<sup>38</sup> MOLNÁR, Benedek – NÉMETH, Márton – TÓTH, Péter: *Mérlegen az Alaptörvény* [The Fundamental Law of Hungary on scales]. Budapest, 2013, HVG-ORAC, p. 209.

human beings different from any other living being such as plants and animals. Moreover, this right is absolute and a border of self-autonomy that neither any citizens nor the state is allowed to cross, which consequently means that it cannot be restricted at all.

The President of the Court emphasized several times in his explanation that the key point of this debate is how to interpret "arbitrary restriction". He claimed that there is a formal, procedural requirement according to which rights can only be restricted in a process and based on a goal prescribed by the law, but he stated that this kind of formal legality does not expel arbitrariness, thus there has to be a side of content. As a consequence, no distinction can be made between the restrictions of the rights to human dignity and life because any restriction of them terminates the basic meaning of the right, which is the right itself, therefore it is conceptually impossible to constitutionally restrict these rights, which means death penalty was completely unconstitutional.

## **6. Summary**

To sum it up, capital punishment has been regulated differently throughout the history. From the ancient times to the 18<sup>th</sup> century it was a part of the daily life until the enlightened philosophers questioned its necessity and efficiency. The authoritarian regimes of the 20<sup>th</sup> century used it as a tool of political retribution, which apart from the above-mentioned aspects, explicitly showed the dangers of this legal institution. Fortunately, the European legislatures began to abolish death penalty in the second half of the 20<sup>th</sup> century and Hungary finally joined the community of abolitionist countries made up of 104 members.<sup>39</sup>

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<sup>39</sup> Death Penalty Information Centre: Abolitionist and retentionist countries. <https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140> [Access April 29, 2018]

# **Mia MILANOVIĆ: The Crime against Nature in the Croatian Criminal Law during the Period from Codification of Substantial Criminal Law in 1852 until its Decriminalization in 1977**

**University of Zagreb, Faculty of Law**

## **1. Introduction**

History shows that there have always been people who engage in what we would now identify as same-sex romantic or sexual relationships. The acceptability and understanding of these relationships have varied throughout the centuries, but they have always been a part of every culture. For centuries there have been powerful voices to condemn homosexual conduct as unnatural immorality. It's interesting to mention that the term "homosexual" appeared only in the 19<sup>th</sup> century, in Europe, and gradually took hold more broadly. It was invented by the Hungarian Károly Mária Kertbeny in 1869 and it became more widespread after it was taken up by the medical community. Until that point in time, society did not distinguish the people, but the acts against nature or so-called sodomy.<sup>1</sup>

Sodomy was severely condemned in many countries and up until the end of the 18<sup>th</sup> century was punished by death. Namely, during the central Middle Ages, a vicious rationalization became popular, claiming that sodomy was equivalent to murder (or worse) as it threatened the survival of the human race. The Enlightenment and the French Revolution had consequences for sodomites. With the Enlightenment the legal thinkers of Europe began the secularization of the criminal law. Beccaria and Voltaire, and their followers, arguing that the crime of sodomy belonged to canon and not to civil law, convinced the educated public that offences against religion and morality were matters for confession rather than concerns of state. The death penalty for sodomy was dropped, but sodomy continued to be criminal offence, punishable by forced labor and imprisonment.<sup>2</sup>

Most significant was the change in the motivation of the laws which punished homosexual relations. While medieval legislators had only to refer to the Bible, modern

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<sup>1</sup> TAMAGNE, Florence: A History of Homosexuality in Europe. Vol. I & II: Berlin, London, Paris 1919–1939, Algora Publishing, Baltimore, 2006, p. 6.

<sup>2</sup> DYNES, Wayne R. (ed.): Encyclopedia of Homosexuality. Vol. 1, Routledge Revivals, New York, 2016, pp. 197–198, 684.



lawmakers have had to rationalize their condemnation with the pseudo-utilitarian claim that homosexual act "undermine the moral fiber of the nation" or would reduce the birth rate so drastically as to raise the specter of race suicide, or with some allusion on "moral feelings of the people" that are offended by homosexual behavior.<sup>3</sup>

## **2. Criminal Code on crimes, misdemeanors and contraventions of 1852**

The Criminal Code of 1852 entered into force in Croatia and Slavonia on September 1, 1852. This Code largely adopted the sex crimes from the previously Austrian Criminal Code of 1803 and renumbered them, but the penalty for homosexual conduct and conduct with animals, which always has been regulated in the same provision, was again dramatically raised to dungeon imprisonment from 1 to 5 years.<sup>4</sup>

The crime of unnatural fornication was prescribed in Articles 129 and 130. The definition of this crime was: „unnatural fornication, i.e. fornication committed by a human being with another of the same sex or with an animal“. As mentioned, the imposed punishment was dungeon imprisonment from 1 to 5 years. A more severe punishment of dungeon imprisonment from 5 to 10 years was imposed in the case of forced unnatural fornication, committed by force, or by threat of violence.<sup>5</sup>

The Code did not restrict the offense to males. The words "lewdness against the order of nature" should be interpreted in the way to cover all kinds of same sex conduct, not limiting it to acts analogous to sexual intercourse. This caused great problems in jurisprudence regarding the definition of act of committing this crime: whether the act of committing had to be interpreted restrictive (*coitus per anum*) or extensive (other immoral practices). The Supreme Court repeatedly held that any sexual act constituted the offense, although mere touching of the genitals did not. For example, according to decision of the highest Croatian Court, Table of Seven from 1890, only pederasty but not masturbation,

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<sup>3</sup> *Ibid.*, p. 684.

<sup>4</sup> WEST, Donald J.; GREEN, Richard (ed.): *Sociolegal Control of Homosexuality: A Multi-Nation Comparison*, Kluwer Academic Publishers, New York/Boston/Dordrecht/London/Moscow, 2002, p. 271.

<sup>5</sup> ŠILOVIĆ, Josip: *Kazneno pravo, Po Dru. K. Janki* [Criminal law, By K. Janka], Fourth edition, Zagreb, 1908, p. 424.

even if it was committed by the participation of a person of same sex, will be punished as a crime against nature.<sup>6</sup>

### **3. Criminal Code of the Kingdom Yugoslavia of 1929**

Criminal Code of 1852 remained in effect in Croatia and Slavonia even after the collapse of the Austro–Hungarian Monarchy, and it was in force until 1929, when the Criminal Code of the Kingdom Yugoslavia from 1929 was proclaimed. Criminalization of consensual homosexual relationships continued during the period when Croatia was part of Kingdom of Yugoslavia, from 1918 to 1941.

Homosexuality remained a crime under Article 285, which prescribed the crime against nature. This provision sanctioned each act of culprit, who sought and found sexual satisfaction with a person of same sex. The prescribed punishment was a strict imprisonment from 7 days to 5 years. It should be noted, that both male and female same-sex sexual activity according to this Code were illegal. It was thought also, that the law criminalized all anal intercourses as unnatural acts, both homosexual and heterosexual. For the punishable nature of this act, criminal intent was required. Perpetrator must act with the knowledge that he is using the body of other person (of the same or different sex) to satisfy his sexual urge in unnatural way. The crime was completed when sexual enjoyment occurred on the body of another person.<sup>7</sup>

### **4. Criminal Code of Federal People's Republic of Yugoslavia of 1951**

After the World War II, when Croatia became a republic within Federal People's Republic of Yugoslavia, homosexuality was still a crime under the Article 186 of the Yugoslav Criminal Code of 1951. The mentioned article prescribed the crime of "unnatural fornication between males".

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<sup>6</sup> Samo pederastija a ne i onanija, makar i obavljena sudjelovanjem osobe istoga spola spada pod udar § 120 I. sl. b. k. z. [Only pederasty but not masturbation, even if it was committed by the participation of a person of same sex, should come under the provision of § 120, Section I], Mjesečnik pravičnog društva u Zagrebu, vol. 7, 1881, pp. 41–42.

<sup>7</sup> DOLENC, Metod: Tumač Krivičnog zakonika Kraljevine Jugoslavije [Commentary on the Criminal Code of the Kingdom Yugoslavia], Tisak "Tipografija" d. d., Zagreb, 1930, p. 362.

The decision to keep "unnatural fornication" as a crime in the Yugoslav criminal justice system was neither self-explanatory, nor it was decided unanimously and tacitly. On the contrary, the original intent of legal experts from the head of the Communist Party and the State was to completely decriminalize homosexuality. But there were different voices who warned that the construction of socialism presupposes "new and healthy man". This term presented an ideological category from which any form of non-heterosexual life was excluded. Consensual sex acts between males became a criminal offence punishable up to 2 years in prison. It's clear that this Criminal Code was concerned only with some selected parts of homosexual conduct and not the whole field of homosexuality. For example, the law paid no regard to consenting female homosexuality. In other words, female homosexuality as such was ignored by this Criminal Code, being regarded on much the same footing as heterosexual conduct. Therefore, it can be concluded that female homosexuality was perceived as socially less harmful phenomenon.<sup>8</sup>

In 1956 the Article 189 on "unnatural fornication between males" was amended. By this amendment this article was divided into two paragraphs, which specifically and separately incriminated forced and voluntary unnatural fornication between males. Also, there was a corresponding difference in the prescribed punishments. In the case of forced unnatural fornication between males (i.e. „if a person by means of force or by threat of direct assault upon the life or body of another person, compels this person to unnatural carnal copulation”), the punishment of severe imprisonment up to 10 years was imposed. On the other side, voluntary unnatural fornication between males should be punished by imprisonment for up to one year.<sup>9</sup>

## **5. The Criminal Code of the Socialist Republic of Croatia of 1977**

For the next 20 years, criminologists, sexologists, doctors and lawyers increasingly advocated in the public the necessity of complete decriminalization of homosexuality. In

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<sup>8</sup> STOJANOVIĆ, Zoran: Povreda seksualnog morala kao isključivi osnov određenih inkriminacija sa naročitim osvrtom na dobrovoljni protivprirodni blud između lica muškog spola [The violation of sexual morality as exclusive basis of certain incriminations, with special regard to voluntary unnatural fornication between males], Unpublished magistral thesis, University of Beograd, 1973, pp. 46–48.

<sup>9</sup> STOJANOVIĆ, Zoran: Kriterijumi određivanja inkriminacija. Uopšte i u sferi seksualnih odnosa [Criteria for determining incriminations. In general, and in the area of sex crimes], Unpublished doctoral thesis, University of Ljubljana, 1981, pp. 353–356.

1973, American Psychiatric Association removed homosexuality from the list of mental disorders and silenced scientific marginalization of homosexuals.

During the 1970s the power over criminal legislation in Yugoslavia was devolved from the Federal Republic to the eight federal republics and provinces. Namely, the constitutional amendments and the Constitution of the Socialist Federal Republic of Yugoslavia of 1974 delegated a broad selection of matters to the republics and provinces, which largely expanded republic legislation. The most important matters were still regulated by the federation, while republic laws were conditioned by federal ones.

As a result, significant change finally occurred in 1976 when a Croatian parliament enacted the Criminal Code of the Socialist Republic of Croatia, which came into force in 1977. With this Code Croatia basically decriminalized homosexual conduct. Article 186 on unnatural fornication between males was abolished. The Criminal Code of 1977 sanctioned only forced homosexual acts between male persons. The imposed punishment was imprisonment from 6 months to 5 years. More serious form of crime with harsher punishment was prescribed in cases when the victim was a male child (prison from one month to 10 years), or a minor who had reached 14 years (prison from 3 months to 5 years). As we can see, the age of consent (minimum age) for male homosexual relations was set at 18 years, compared to 14 for heterosexuals which was a discriminatory provision. Once again, female homosexuality was not prescribed as criminal offence.<sup>10</sup> To conclude, same-sex relations in Croatia were decriminalized in 1977 but the age of consent was set considerably higher (18 years of age) than for heterosexual acts (14 years of age).

## **6. Criminal Code of Republic Croatia of 1997**

After its independence, Croatia firstly adopted the criminal legislation of the former Yugoslavia. In September 1997, Croatian parliament passed a new penal code, Criminal Code of 1997. In this Code the crime against nature was completely excluded and all other criminal offenses against sexual freedom and sexual maturity became sexually neutral. The perpetrator as well as the victim can be both male and female. Also, it equalized the age of consent for all sexual activities at 14 years. This was in accordance with the cognition that

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<sup>10</sup> Krivični zakon socijalističke republike Hrvatske [Criminal Code of the Socialist Republic of Croatia], Nr. 25, Narodne Novine, 1977, Art. 88.

the incrimination of homosexual behavior has no rational explanation, but it can have harmful consequences for society. Experience has shown that criminal law cannot affect the volume of homosexuals in the world.

## **7. Conclusion**

The history of homosexuality consists in studying the relations between homosexuals and society. The laws governing sexuality, including homosexuality, have been shaped by social attitudes toward homosexual. For the long time, homosexuality was hidden and ignored, yet at the same time criminal prosecuted. The period of the 19<sup>th</sup> and 20<sup>th</sup> centuries witnessed the emergence of homosexuality in the modern sense of the word. The path to homosexual rights was long and difficult. This is evident also in the example of Croatia. Both male and female same-sex sexual activity was legalized in Croatia in 1997 with the introduction of Croatia's own Criminal Code. The status of same-sex relationships was first formally recognized in 2003 under a law dealing with unregistered cohabitations. The result of a 2013 referendum had led to definition of marriage in Croatian Constitution solely as a union between a woman and man, effectively prohibiting same-sex marriage. Nevertheless, since the introduction of the Life Partnership Act in 2014, same-sex couples effectively enjoy rights equal to heterosexual married couples in everything except adoption rights. However, the separate legislation does provide same-sex couples with a mechanism similar to step-child adoption called "partner-guardianship". Contemporary Croatia bans all discrimination on the grounds of sexual orientation, gender identity, and gender expression.

# **Kíra Réka HERNÁDI: How did the Most Important Hungarian Penal Institutions and Prisons Develop after 1848?**

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## **1. Introduction**

Actions against criminals and penal sanctions are simultaneous with the society. During history many kinds of retaliation and tantalising punishment have become widespread. Penalty methods have varied from culture to culture. Punishment is the "remedy for sin" determined by the State and has an impact on the evil spirits.<sup>1</sup> We can speak about death penalty, corporal punishment, penalties against property, humiliation and imprisonment. From these, the last one has been the most applied method in the civilisation. In this case the freedom of the convict is restricted and he does not pay with money or with his life. In this way the imprisonment has become the essential punishment in the modern society.

A punishment method must be conformed to several requirements. It is good if the punishment is fair, it is in accordance with the sins, it has an effect on the improvement of the criminal and beneficial for the financial conditions.<sup>2</sup> Furthermore it is important to be personal, educational, preventive, proportionate, equal, human and protective.<sup>3</sup> Imprisonment is the only way which meets these requirements as its main aim is improving so that he/she can readjust into society after releasing from prison.<sup>4</sup>

## **2. The difficulties of the deprivation of liberty in Hungary**

In Hungary we cannot speak about organised deprivation of liberty punishment till the 19<sup>th</sup> century, although the Sanctio Criminalis Josephina (1787) made custodial sentence as the elemental punishment. However, in our country it was not so easy to make this regulation to come into force, because there were no suitable institutions for the prisoners. The word "prison" was also rarely used, as its feudal name "dungeon" was still alive in the colloquial

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<sup>1</sup> MEZEY, Barna: A magyar polgári börtönügy kezdetei [The beginning of Hungarian civil prison]. Budapest, 1995, Osiris-Századvég, p. 135.

<sup>2</sup> *Ibid.*, p. 114.

<sup>3</sup> *Ibid.*, p. 118.

<sup>4</sup> *Ibid.*, p. 87.

Hungarian language. The Hungarian Revolution and War of Independence of 1848–1849 was a starting point in the development of the imprisonment system. After the failure of the revolution the dungeons were filled with patriots. In addition, Haynau, an omnipotent Austrian military commander, executed and imprisoned several Hungarian soldiers during the revenge. The great number of custodial sentences caused significant changes in the system. The development of the Hungarian prison system was determined by the Austrian Criminal Code of 1852. According to this Code the deprivation of liberty was considered to be the suitable penalty. The Government commended the formation of the appropriate institution system.<sup>5</sup>

Unfortunately, Hungary had to face serious difficulties and disadvantages due to the lack of the institutions, while Austria at that time had twelve prisons. The national penitentiary foundation campaign took place between 1852 and 1856.<sup>6</sup> According to the Decree of Austrian Minister of Justice in 1854, six national penalty institutions were established in Illava, Márianosztra, Vác, Lipótvár, Munkács and Nagyenyed.<sup>7</sup> As there were no suitable institutions for prisons, the penitentiaries were established in castles, barracks, churches and convents. Another serious problem was that the modern civil system had to be built in the feudal structure.<sup>8</sup> The real centre of the penalty system was the Governor's Council. This body maintained the relations between the prisons and the ruler; furthermore it provided the tasks and gave instructions to the governors of the prison. In addition, it must have informed the ruler about the conditions of the prisons and the exceptional events. All of the governors were subordinated the Governor's Council.<sup>9</sup>

The system at that time suffered from severe problems because of underdevelopment and bad terms of construction. The old buildings, churches were inappropriate for this aim, because the walls were often wet, so from hygienic aspect they were unusable. Moreover, the number of solitary was very low, and the prisoners had to spend the nights or the full day in common dormitories. The problems were becoming even more serious, as these buildings old structure were not suitable for ventilation of the rooms, also because there was no opportunity of having a shower and doing exercises.

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<sup>5</sup> LUKÁCS, Tibor: Szervezett dilemmánk: a börtön [Our organised dilemma: the prison] Budapest, 1987, Magvető Kiadó, p. 90.

<sup>6</sup> MEZEY, *op. cit.*, p. 209.

<sup>7</sup> LUKÁCS, *op. cit.*, p. 91.

<sup>8</sup> MEZEY, *op. cit.*, p. 210.

<sup>9</sup> *Ibid.*, p. 87.

Because of these reasons the health conditions were unfavourable. The staff often got into the institutions without any qualification, education, sometimes they were soldiers of the army or jobless people from the near villages. All in all, the guards did not own the necessary skills and were inadequate not only vocationally, but also morally.

The penal institutions were tried to be maintained by the Church, but his aim only succeeded in Márianosztra. Lack of education, mental and spiritual care of prisoners were also the drawbacks of the penalty system. The Government tried to take steps in order to improve them, but the opportunities were miserable and they did not take into consideration the previous qualifications, and the financial background could not allow the appropriate salary. Additionally, the regulations, literature, practice and official instructions were also missing. The developed and modern foreign rules could not be adopted to our underdeveloped system.<sup>10</sup>

### **3. The reforms**

The first report in the history was in 1867, which introduced the penalty system to the public, providing that the problems of prisons had become the citizens' important public affair. This report was not a theoretical work, it was about real facts and situation. The prison's capacity was different, as in Munkács 670, in Lipótvár 1.000, in Vác 900 and in Illava 634 prisoners served their sentences. The biggest one was in Szamosújvár, which was appropriate for 1.028 persons.<sup>11</sup>

The theoretical base of the system's development appeared in the second half of the Austrian reign, whose starting point was the visit of Hungarian experts to foreign prisons. Ágost Pulszky's and Emil Tauffer's visits' main aim was the improvement of the prison system, so they explored the domestic and neighbouring jails.<sup>12</sup> They wrote a study about it, and this can be considered to be as the beginning of the modern Hungarian specialized literature of the penalty system, and served as an influential factor. The jurists did not possess the necessary terminology and the most essential questions were not clear because of backwardness.

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<sup>10</sup> *Ibid.*, pp. 96–110.

<sup>11</sup> *Ibid.*, p. 95.

<sup>12</sup> *Ibid.*, p. 123.



Afterwards, the so-called solitude system appeared in Hungary, namely the complete separation of the prisoners and the others, which meant that during the day the convicts worked together, and they were separated only at nights. The solitude system had more advantages, but it was also more high-priced. The biggest obstacles of the Hungarian system were the previously created bad conditions and the missing material resources.<sup>13</sup> The next reform was in 1868, when the foreign experiences were again studied. It became important to improve the health conditions, support the staff's professional preparedness, make the higher level regulation, reach the coherent church control, make the education and spiritual care better, build new institution, so with one word, the whole system reconstruction. For the appropriate prisons it was indispensable to have a location near a city, be suitable for solitary confinement and qualified and guiding crew.<sup>14</sup>

The penitentiary regulation came into force in 1869, which reflected the principles of the prison matters. It was partial, because it was valid only for national penitentiaries and it was temporary too, until the creation of the uniform prison matters. In the same year there was another regulation which put significant emphasis on education, work, ethical improvement and the necessary legal conditions. This was called "House rules and official orders for the penitentiary officers and guards".<sup>15</sup> The temporary period was closed by the Prison Regulation of 1874. The meaning of the most important terms was determined that time. A prison worked next to the District Court, while jail functioned next to General Court. The criminals, who committed more serious crimes, were kept under strict control in penitentiaries. Afterwards Hungary tried to develop regulation with modern methods and European standards. In the Austro-Hungarian Monarchy the biggest question was, whether the law enforcement could be organised based only on professional points, without social relations. In our country the institutions could not be managed uniformly, because the county prisons belonged to the Interior Minister's power.<sup>16</sup> At the time, the prison affair became even more modern.

In the 1880s huge construction wave swept through the country and many prisons, courts, public prosecution's offices were rebuilt and new projects were carried out. These

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<sup>13</sup> *Ibid.*, p. 172.

<sup>14</sup> *Ibid.*, p. 158.

<sup>15</sup> *Ibid.*, p. 186.

<sup>16</sup> *Ibid.*, p. 167.

enormous buildings became a symbol of the cities. Several famous architects took part in the constructions, which were carried out according to the models of the neighbouring countries.<sup>17</sup> The penalty system was renewed in 8 years of great efforts, and the modern national prison system was formed, but it had to face more difficulties and disadvantages than the Austrian version.<sup>18</sup> After that, several buildings were built, and these determined the face of the law enforcement. The Csemegi Code came into force in 1880, and provided the theoretical base of creating new buildings. However, the necessary economical conditions were missing.

#### **4. Institution of Sopronkőhida**

In 1878 there was no penal institution in the Transdanubian region despite the fact, that the Code had prescribed it.<sup>19</sup> By the Act 20 of 1884 on the national penal institutions, the penitentiary of Sopronkőhida could be built according to Gyula Wagner's plans. For the construction an old sugar factory was the most suitable. In the history there were several problems regarding this prison because after Trianon it belonged to Austria, and it was reunited with Hungary with the referendum of 1921.<sup>20</sup>

After World War II the prison got bigger emphasis in the political life. In 1944 the Nazi soldiers occupied Sopronkőhida too, and Szálasi, who escaped from the country, placed the prisoners here. The penal institution served as a prison camp for a short time. During the Soviet era many political prisoners spent their punishments in Sopronkőhida, like Endre Bajcsy-Zsilinszky, who was a famous victim of the communist system, József Mindszenty, who was archbishop, prince primate and previous Prime Ministers Miklós Kállay and Géza Lakatos.<sup>21</sup>

The prisons got a great political role in the Soviet era due to the ideology. Great number of innocent people had to go to jail because of show trials. In 1948 the Hungarian State got back the institution and renovating was started. In 1956 there were huge prison rebellions, in which 3.000 prisoners died. The Government ordered severe measures to

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<sup>17</sup> *Ibid.*, p. 180.

<sup>18</sup> *Ibid.*, p. 193.

<sup>19</sup> KUNTZ, Zoltán – PANTALI, Zoltán: Sopronkőhida, a legyek börtöne [Sopronkőhida, the prison] Budapest, 2014, Oriold és Társai Kiadó, p. 11.

<sup>20</sup> *Ibid.*, pp. 15–16.

<sup>21</sup> *Ibid.*, pp. 17–18.

prevent those actions in other jails.<sup>22</sup> After the change of the regime in 1989 and 1990, the State tried to solve the serious problems with renovation work which lasted 10 years.<sup>23</sup> Nowadays 699 men can serve their sentences in the institution especially repeat offenders or multiply repeat offenders.

## **5. Prison of Vác**

The town of Vác was an important centre even in the medieval times and remained also in the civil period of history. The Theresianum can be found there, which previously served educational purposes, but after 1855 the Ministry of Justice got the building and after that it served as a penal institution. Its foundation was in connection with Criminal Code of 1852, and the first prisoner arrived in 1855.<sup>24</sup> It housed criminals, whose punishment was deprivation of liberty more than 1 year. The prisoners usually were poor and came from the lower layer of the society.<sup>25</sup> The jail tried to take care of them and help the well-behaved persons financially after they were released. The penitentiary staff put big emphasis on education and on spiritual care. Furthermore, the convicts were employed constantly.<sup>26</sup> Besides a pharmacy and hospital, from 1880 a huge library with hundreds of books belonged to the prison. In spite of the positive features in the 1920s 42 prisoners escaped.<sup>27</sup> In the 20<sup>th</sup> century the prison constantly changed and from 1945 it got new names. Nowadays 608 men can be incarcerated here mainly for serious crimes.

## **6. Institution of Állampuszta, Balassagyarmat and Baracska**

The prison of Állampuszta was an intermediary institution for criminals who have spent almost two thirds of the punishment. For exemplary behaviour they were allowed to get milder sentence according to Code Csemegi. The penalty institution was established in

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<sup>22</sup> *Ibid.*, p. 29.

<sup>23</sup> HEINRICH-TAMÁSKA, Péter: *Kis magyar börtöntörténelem* [Little Hungarian prison-history] Budapest, 2013, Unicus Műhely, p. 279.

<sup>24</sup> SZABÓ, Géza: *A váci fegyintézet alapítása és működése 1855–1939*, [The establishment and function of the prison of Vác, 1855–1939], In: BÓDINÉ BELIZNAI, Kinga (ed.): *Tanulmányok a magyar börtönügy történetéből*, pp. 94–96.

<sup>25</sup> *Ibid.*, p. 96.

<sup>26</sup> *Ibid.*, p. 100.

<sup>27</sup> *Ibid.*, p. 106.

1883 and the first prisoner arrived in summer of 1884.<sup>28</sup> During World War II it had to face several difficulties, because the guards were called into military service in 1944.<sup>29</sup> Today there are two separate parts of the prison and 637 men can spend their punishment here, mainly milder sentenced criminals.<sup>30</sup>

The prison of Balassagyarmat, the oldest institution with monument features, was built between 1842 and 1845. Its form is similar to a cake. After Trianon it came to the country border. In the Soviet era it was full of political and the show trials' victims, until 1963 the number of the prisoners was constantly getting higher.<sup>31</sup> At the time, it was regarded as a small prison with 282 places for the criminals. Mainly men for serious crimes are incarcerated here.

The penalty institution of Baracska was managed by the Minister of Justice from 1945. In 1953 it became independent, so the number of the criminals and the penitentiary staff was increasing. Similarly to the prison of Állampuszta, it was also an intermediary institution for the well-behaved women and men.<sup>32</sup> In the Soviet system there were really strict rules in the prison. It got its present name in 1972. In 1994 the prison was merged together with the institute of Martonvásár and it became the prison of the careless criminals, especially of people, who denied the military service, the Jehovah's Witnesses, and those who committed the crime accidental or due to bad luck.<sup>33</sup> Nowadays together 1.028 prisoners can serve their punishment here, mainly for not so serious and dangerous crimes.

## 7. "The Collector"

The notorious prison of Kozma Street in Budapest was built in the year of the Millenium (1896). In the common language it is known as the "Collector", because this institution transports the convicts between the prisons. It is the "heart of the prisons", as the population of the prison world is moved through the Kozma Street building.

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<sup>28</sup> HEINRICH – TAMÁSKA, *op. cit.*, p. 35.

<sup>29</sup> *Ibid.*, p. 41.

<sup>30</sup> *Ibid.*, p. 51.

<sup>31</sup> *Ibid.*, p. 61.

<sup>32</sup> *Ibid.*, p. 161.

<sup>33</sup> *Ibid.*, p. 164.

In the past, when this prison was established, the outdated penitentiary institution of Munkács could have been abolished. In 1919 Béla Kun, who was the leader of the Hungarian Soviet Republic (Tanácsköztársaság) from 1918 to 1919, was kept between the walls of this prison, too. Up to World War II here was the only prison museum in the country. In the Soviet era the institution had a significant role, as it was the prison of the State Protection Authority during the hegemony of Mátyás Rákosi, the dictator of the communist regime from 1945 to 1956. After the Revolution and War of Independence of 1956 the prison was filled with political inmates. It got its present name in 1978.<sup>34</sup>

## **8. Prison of Kalocsa and Márianosztra**

The prison of Kalocsa was established in 1897. This was the first workhouse for women in 1916, mainly for dangerous work shirkers. In 1950 the prison of Márianosztra moved to the building and the institution of Kalocsa became the national prison for women. It was almost always overcrowded, because not only women but also babies came to the prison with their mothers. There were several famous inmates of the prison, for example Szálasi's wife Gizi Lutz, Mária Wittner because of the participation in the Revolution and War of Independence of 1956, but later she became a politician, and Margit Mária Mester who was a famous nun. The conditions in women's prisons were usually favourable and humane. However, the women committed crimes especially against life, generally in family. Since the Millennium this has been the strictest prison for women.<sup>35</sup> 216 criminals can spend their punishment here, some of them are sentenced to life imprisonment.

The prison in Márianosztra was established because of the growing number of crimes after 1848. This modern women prison was created with the use of monasteries.<sup>36</sup> The opening ceremony was held in October 1858. The tasks were completed by nuns of St. Vincent Order, who were separated from the world, too. In World War II the settlement was in the frontlines, so according to the order of the Minister of Justice the prison was evacuated. After 1949 the institution got to the Hungarian State from the nuns. In the next years the women were moved to Kalocsa and the prison was transformed to men's prison

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<sup>34</sup> *Ibid.*, pp. 82–88.

<sup>35</sup> *Ibid.*, pp. 137–146.

<sup>36</sup> *Ibid.*, pp. 177–178.

for the State Protection Authority.<sup>37</sup> In the 1960s it was used for guarding political convicts. At the time, the penalty institution got a new director, Pál Kiszely, whose main aim was the modernisation and development of the system.<sup>38</sup> Nowadays it is a strict prison for repeat and multiply repeat offenders. There is place for 533 men.

## **9. Penalty institution of Sátoraljaújhely and the Starprison**

The establishment of the prison of Sátoraljaújhely was allowed by a decree sent out by the Minister of Justice in 1899.<sup>39</sup> The construction took place between 1901 and 1906. In 1943 the institution became a military prison and lost the previous county features. The famous prison museum, which showed the history of the law enforcement and the important penalty institutions, was closed in 1945 and was opened again in 2006. Marinko Magda, the notorious Serbian serial killer was kept here, too.<sup>40</sup> In this institution are incarcerated criminals, who are repeat offenders and committed especially crimes against property and violent crimes. Its capacity is 253 persons.

The most famous prison in Hungary is the penalty institution of Szeged, which is known as the "Starprison" in the common language, thanks to its layout and panoptical system.<sup>41</sup> The construction according to Gyula Wágner's plans began in spring 1883 and ended in August 1884. The prison combined three types, the state, the regional and the forensic prisons. The history of the institution is the same age as the civil, modern prison system. The first convicts came from the city surroundings. After World War II the population of the prison changed a lot.<sup>42</sup>

The Algyő–Nagyfai object previously belonged to Szeged, but in 1957 it became an independent institution. In 1981 it had an expanded penitentiary staff, teachers', specialists' and medical network.<sup>43</sup> In 1999 the Government introduced the life imprisonment, and it influenced the population of the Starprison, as the number of

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<sup>37</sup> *Ibid.*, p. 196.

<sup>38</sup> *Ibid.*, p. 207.

<sup>39</sup> *Ibid.*, p. 241.

<sup>40</sup> *Ibid.*, p. 254.

<sup>41</sup> *Ibid.*, pp. 293–294.

<sup>42</sup> *Ibid.*, p. 298.

<sup>43</sup> *Ibid.*, p. 329.

prisoners was expanding rapidly. Today, this is the severest institution, where several famous convicts spend the days.

## **10. Juvenile offenders**

The Government established a building for the juvenile offenders in Tököl, according to a decision of 1907. For this purpose, seven prisons were chosen, which functioned previously as adult penalty institutions. The Government published a decree-law in 1951, in which it was determined, that the boy offenders must be guarded in Cegléd, whilst the girls had to spend the punishment in Kecskemét. After that, this system relocated to Sátoraljaújhely and in 1959 to Budapest. The prison moved to Tököl in 1963.<sup>44</sup> The conditions were unfavourable, but the staff tried to put a big emphasis on education, because there were many illiterate offenders. Previously the capacity was only 71 persons, but it was expanding rapidly, and 370 offenders could spend their sentence in March 1963.<sup>45</sup> The combination of the prisoners became worse, there were much more illiterate and uneducated juvenile mainly convicted for violent crimes. Most of the offenders were boys. From 1979 drug abuse became a crime, which increased the number of convicts. Moreover, self-destructive lifestyle and disadvantageous family background made the situation even worse. The young persons could not fit back to the society at all or only hard.<sup>46</sup> Nowadays there are juvenile prisons in Pécs and Szirmabesnyő.

## **11. The communist regime and today's situation**

In the communist state the prisons had a significant role due to the show trials and People's Court, the institutions were centralized according to the Soviet model. However, the conditions were disadvantageous, the system had several problems. During the Kádár era the prison world was separated from the public, it got emphasis after the change of the system. The Government at that time tried to improve it and make modern conditions for the convicts by adopting the EU principles. In 1996 a new regulation was published about the cells' size, and strict rules were introduced because of the overcrowdedness. Today's

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<sup>44</sup> *Ibid.*, p. 115.

<sup>45</sup> The data about the capacity of the prisons: [www.bv.gov.hu](http://www.bv.gov.hu) [Access April 1, 2018]

<sup>46</sup> HEINRICH – TAMÁSKA, *op. cit.*, p. 123.

situation can be analysed by statistics. The number of the inmates increased, but this tendency seems to have been stopped in the last few years:

<b>Year</b>	<b>Number of inmates</b>
2010	15373
2011	16203
2012	17195
2013	17517
2014	18042
2015	17792
2016	18023

As the amendment and the statistics show the number of convicts grew by thousands between 2010 and 2014, after it decreased slightly. From other details we can see, that the number of the women convicts was insignificant, together 7,28 %. Most prisoners in the institutions were between the age of 30 and 39. Preventing juvenile delinquency has been getting more emphasis in the last few years.<sup>47</sup>

The problems of the prison affair even in the 21<sup>th</sup> century could not be eliminated, because it requires financial resources and longterm plans. The backwardness, lack of places, the unfavourable conditions of education, health care, violence, the escape and the difficulties of fitting the society are the problems, that still exist and it is not easy to solve, because there will be always new issues, for which the Government has to find a solution.

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<sup>47</sup> Börtönstatisztikai Szemle [Prison Statistics Review], 2017/1.



# **György Tamás SVEDA: Formation and Development of the Detainees' Rights especially in the 19<sup>th</sup> and 20<sup>th</sup> Centuries and their Interpretation in Nowadays' Constitutional Framework**

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## **1. Introduction**

In my essay I will present the development of the rights which the prisoners were entitled to during the 19<sup>th</sup> and 20<sup>th</sup> century in Hungary. It had an enormous effect on the approach of our days. Furthermore, I would like to interpret the detainees' rights in the framework of an effective juridical inspection, with taking the principle of rule of law into account. Finally, I will touch upon the means the detainees can use nowadays in the Hungarian legal system if they suffer any legal injury.

Before the examined period, the sentence of confinement gained legitimacy only through a slow and cumbersome process. During the Middle Ages and early modern times – which were characterized by the relationship between the landlords and bondmen and the cultivation of the lands by the latter, underprivileged stratum – this type of punishment was mainly applied in bigger cities. If the landlords used the sentence of confinement as well they would have deprived themselves of labour force, causing by this income deficiency and economic damage.<sup>1</sup>

## **2. The roots of development**

Entering the 1800's, man of the era could witness a dynamic development tendency. The administrative prisons appeared, mass placement in one cell was replaced by the system of private cells, which contributed to the increase of the detainees' minimal living-space. In 1816 the employment of the prisoners was regulated by an order, which says: „if the detention rooms of the authorities allow it, the prisoners should do handwork corresponding to their sex, and their wage has to be spent on their boarding in such a manner that a part determined by the authorities has to be saved and after their release it

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<sup>1</sup> MEZEY, Barna: Magyar jogtörténet [Hungarian legal history], Budapest, 2007, Osiris Kiadó, p. 306.

has to be delivered to them, and if any sum was collected for them from charity or from any other sources, the authorities have to spend it on their common boarding”.<sup>2</sup>

### **3. The prison improving movement**

During the Reform Era between 1825/1830 and 1848 a kind of prison improving movement evolved in which practically every politician of this era participated. They established the work of the professionals in penology in the first decades of the Austro–Hungarian Compromise. Between 1851 and 1867 there were also important stations in connection with this long development. Six institutions, constituting the basis of the Hungarian network of detention facilities were opened in 1854 and 1855: in Illava, Lipótvár, Vác, Munkács, Márianosztra and Nagyenyed.<sup>3</sup>

Pursuant to the order No. 20172/1863 of the Royal Locotenential Council on the organization of the administrative prisons, prisoners were employed in the above-mentioned institutions according to the following rules: 1) pretrial prisoners could be employed only within the county hall; 2) persons sentenced by a final judgement could work outside the institutions with the following restrictions: people from more respectful ranks could not be employed in external work; dangerous criminals could not even leave the county hall until they got into the detention facility; at the time of the national or weekly fairs no one could go for external work; finally, their strict guarding had to be ensured and it had to be ensured that they could not contact free persons while working. The statute in general did not determine the wage payable to the prisoners as the consideration of their work but the followings were ordered: „the prisoners’ wage always has to be more moderate than the usual local day-rate, the employer has to pay it to the reeve in advance which has to be recorded in a journal”.<sup>4</sup>

Thanks to the Austro–Hungarian Compromise in 1867, which settled the situation of public law between Austria and Hungary, the independent and responsible Hungarian government could be set again. One of the most important tasks of this cabinet was to

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<sup>2</sup> MEZEY, Barna: A fenyítőházak forradalma. A modern büntetés-végrehajtás alapvetése Európában [About several issues of the development of the prisoner’s rights, from deprivation of rights until the detainees’ rights]. Budapest, 2012, Gondolat Kiadó, p. 411.

<sup>3</sup> *Ibid.*, p. 364.

<sup>4</sup> Order No. 20172/1864 of the Locotenential Council

eliminate the damages caused by the neo-absolutism in the Hungarian legal system and to reform it completely.<sup>5</sup> It also became possible to involve penology under the control of the Hungarian ministry from 1867.

#### **4. The Irish progressive system**

If we get a nearer view of the institutions, we can say that their regime was dominated by the so-called Irish progressive system. Every convict was subject to private detention for six weeks from the date of the entry. Although on the first three days they received normal board, they did not receive soup in the mornings, they were not allowed to participate on the courses and in the work, they couldn't talk to anyone or contact no one, and their behaviour was especially watched. Habitual criminals underwent this treatment on the first five days of the private detention. If the period of private detention elapsed and no complaints were made in connection with the detainee's behaviour, the possibility of convict labour opened to him/her. In the determined hours every convict was obliged to work continuously. In the assignment of the work, the occupation of each prisoner had to be taken into account and if they did not have occupation, they had to be taught to the trade allowed by their understanding, age, aptitude and physical force. From the net income payable for their work every convict received an amount corresponding to the proportion determined by law.<sup>6</sup>

#### **5. The regulation of the late 19<sup>th</sup> century**

As regards convict labour, the directive of the Minister of Justice no. 696 ordered general compulsory labour for every prisoner as its Article 150 stated: „every convict and prisoner able to work will be forced to work without any difference”.

The tendency of development continued in the 1870s as well. The Act 5 of 1878 (the Csemegi Code) is the first codified Criminal Code in the Hungarian legal history, which

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<sup>5</sup> GOSZTONYI, Gergely: Szabadságjogok [Fundamental freedoms]. In: KÉPES György (ed.): A hatalommegosztás államszervezete, 1848–1949. Magyar alkotmány- és közigazgatástörténet a polgári korban [The state structure of separation of powers, 1848–1949. History of Hungarian constitution and public administration]. Budapest, 2013, ELTE Eötvös Kiadó, pp. 217–232.

<sup>6</sup> KÖVÉR, Ágnes: Rabmunka. Történeti áttekintés a 18.századtól [Convict Labour. Historical review from the 18th century], *Börtönügyi Szemle*, 1994/1

corresponds to the requirements of the modern ages. It set the triple structure of penitentiary – prison – house of detention for the execution of the sentence of confinement. It ordered that prisoners in the house of detention and in the prison have to take the air at least for two hours (Article 38).

A further important development stage was the circular No. 2106/1880 of the Minister of Justice, which says that after his/her release a prisoner could receive fourth or fifth of his/her earnings, contrary to the fifth or sixth in case of a convict. In accordance with the circular letter convicts could not meet strangers at all but the prisoners, pursuant to a special permission could. In a house of detention letters could be written in every third month, in a prison every month and the difference was the same in case of the visits. As a disciplinary punishment the time for walks and the quantity of food were decreased and the application of "short iron" (handcuff joining the prisoner's hands to the ankle) could be ordered.<sup>7</sup> If we look at these legal sources carefully, it unequivocally turns out that convict labour played more and more important role throughout the decades. Moreover, the competition with foreign products was also possible; they could even be squeezed out of the market.

An important development stage of the years prior to World War I was that the prisoners' insurance was acknowledged in 1913. Accident insurance was made compulsory for the working prisoners, debiting the state with the insurance fee.<sup>8</sup> It was the Horthy era that could overpass the chaotic times after World War I for a longer period and the development tendency of penology and of the detainees' rights could continue in the 1920s. Actually, the enacting decree of the Act 12 of 1922 said that from the point of view of industrial law convict labour has to be acknowledged as equivalent to free labour. Furthermore, regulation in the era provided an opportunity to the convicts to take examinations in the prison, having thereby possibility for self-realization after their release.<sup>9</sup>

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<sup>7</sup> Order No. 2106/1880 of the Minister of Justice

<sup>8</sup> Order No. 29300/1913 of the Minister of Justice

<sup>9</sup> KÖVÉR, *op. cit.*

## **6. The effective regulation in the Fundamental Law of Hungary**

At this point, I am taking the occasion to consider the discourse of legal history completed and in the remaining part of my essay, within an effective legal overview, I would like to interpret the rights that the detainees are entitled to and the liabilities charged on them in the constitutional concept of these days.

A constitutional state guarantees the fundamental rights that subjects are entitled to, the enforcement of which is required most of all in the fields where the state can limit them to the greatest extent (e.g. during the execution of the penal laws). The protection and respect of man have to be in the focus in each procedural stage (e.g. in the material, procedural and finally in the execution stage), from which the limit of freedom can be deducted.<sup>10</sup>

The Hungarian Fundamental Law that entered into force on January 1, 2012, stipulates that fundamental rights are acknowledged, they are respected and protected. However, it is also emphasized that under certain circumstances, individuals are responsible to the society. Furthermore, it determines the basic frames of limitability of the fundamental rights. It does not exclude the possibility of final deprivation of freedom either. However, this can only happen because of committing wilful and violent crime, with the reasonable consideration of the criteria of necessity and proportionality.<sup>11</sup> Its legal base is created by the final judgement.

## **7. The rights and duties of the prisoners in the Act CCXL of 2013**

In addition to the regulation of the Fundamental Law ("Magyarország Alaptörvénye"), many statutes give clue for us to know the rights that the detainees' are entitled to and the liabilities charged on them. In general, we can say that during the execution of sentence a part of citizenship rights is suspended, another part of them is partially enforced and there are rights that are unrestricted during the execution of sentence as well.<sup>12</sup> The convicts, however, are entitled to exercise their citizenship rights, which are not contradictory to the purpose of the punishment, in unchanged form also during the execution of confinement.

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<sup>10</sup> LAJTÁR, István: Fogvatartotti jogok a jogállami elvek tükrében [The detainee's rights in the light of the constitutional principles], Budapest, 2015, Országos Kriminológiai Intézet

<sup>11</sup> The Fundamental Law of Hungary, Article IV, Subsection 2

<sup>12</sup> Act CCXL of 2013, Article 9

These rights are the following: use of their mother tongue, mainly in order to know their rights and liabilities; right to defence and representation; right to information, inspection of documents and making copies of them; right to the protection of reputation and personal data; right to legal remedy; right to lawful treatment, to the procedure free from discrimination.<sup>13</sup> These are the rights of the detainees which have to be enforced unlimitedly also during the execution of sentence as well. In this respect the involved person cannot suffer any legal injury.

Furthermore, the Code of Execution of Sentence also names the rights which can be exercised according to certain restrictions. In this aspect, detainees have right to work, learning and self-determination; liberty of conscience and freedom of religion; as well as right to piety and parental control.<sup>14</sup> Article 121 lays down those rights which are suspended during the execution. During the execution of sentence the convict loses his/her right to free movement and moving (e.g. to choose his/her dwelling-place freely and his/her right of peaceful assembly and strike). The free choice of physician is suspended as well. Practically this is the underlying principle of the punishment itself.

Article 122 of the Code of Execution of Sentence also lays down such rights which can be exercised by the convicts only during the sentence of confinement. In other life situations and in case of other citizens they cannot be interpreted. These rights of the detainees represent obligations towards the detention facility, it is unavoidable to guarantee them. These rights, which the involved person is entitled to, are the right to accommodation, catering, clothes, medical attendance, retiring allowance, treatment in case of accidents.

Regarding the catering, meal has to be provided to the convict three times a day, from which at least one has to be hot meal. Furthermore, convicts are entitled to a uniform, shoes and underclothes corresponding to the season. In addition to filling the physiological needs, the right to correspondence, visitors, to send and receive parcels guarantees the contact to the external world and the involved person is entitled to use telephone as well.<sup>15</sup>

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<sup>13</sup> Act CCXL of 2013, Article 12

<sup>14</sup> Act CCXL of 2013, Article 119

<sup>15</sup> Act CCXL of 2013, Article 155-177

## 8. Convict labour nowadays

The act regulates the employer's obligations in detail, according to which, the employer is obliged to guarantee such employment conditions that do not endanger health and safety; to render information, guidance, to educate and to pay wage for the completed work. The detainees' rights expressly include the remuneration payable to convict, determined by law; the attendance in case of accidents, the casualty health service; paid leave for the work. The effective regulation determined the basic wage as at least third of the minimum wage, which can be determined based on the performance and time spent in work. Those convicts, however, are exempted from the obligation to work who are still at school age; pregnant women in the sixth month; convicts that have been accommodated with their children; convicts at retiring age. It is important to state that only convicts that reached the age of 16 can be employed.<sup>16</sup>

Besides respecting the detainees' fundamental rights, the development of their rights reached a level where the prisoners, using the available possibilities of legal remedy, can even enforce their claim for compensation against the state if they suffer any legal injury. In the case of *Varga et al. v. Hungary*, in the judgement passed on 10<sup>th</sup> March 2015, the European Court of Human Rights (ECHR) stated that with the movement space available to the detainees, together with the other inappropriate circumstances, the state caused such suffering to the complainers which exceeded the extent of suffering necessarily pertaining to detention. With this conduct, Hungary practically violated the prohibition of inhuman and slighting treatment stipulated in Article 3 of the European Convention on Human Rights. Therefore, the state had to pay altogether EUR 73.900 to the six complainers who spent their sentence of confinement in different detention facilities of the country. The main reason of the judgement was that the state did not provide the detainees the prescribed air space of 6 cubic meters and the moving space of at least 3 square meters.<sup>17</sup> The employment of the detainees, also has been regulated in the effective Code of Execution of Sentence. It contributes to the successful reintegration of the prisoners into the society.

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<sup>16</sup> Act CCXL of 2013, Article 6

<sup>17</sup> SÖRÖS, László: Napidíj az elítélteknek, az alapvető jogokat sértő elhelyezési körülményekért – avagy 2017. január 01. napján hatályba lépő kártalanítási szabályok a 2013. évi CCXL törvényben [Daily allowance to the convicts, for the circumstances of accommodation infringing the fundamental rights, i.e. the rules of compensation entering into effect on 1st January 2017 in Act CCXL of 2013]. <https://www.jogiforum.hu/publikaciok/830> [Access 10 July 2018]

## **9. Summary**

As a summary, it turns out that the development of law arrived at the standpoint where the sentence of confinement should not be interpreted as income deficiency of the landlords but as an opportunity due to which the detainees will have a chance to return to the society as diligent, honest individuals, useful for the community only owing to a long process. In the constitutional context of these days, the development of the detainees' rights reached a level where the prisoners, using the available possibilities of legal remedy, can even enforce their claim for compensation against the state if they suffer any harm during the execution of the sentence of confinement.



# **Ana TURIĆ: The Execution of Punishment of Imprisonment and Penal System in Croatia and Slavonia (1852–1918)**

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## **1. Introduction**

The criminal offenses and the response of the society to their perpetration, exist from the very beginning. The punishment of perpetrators in the past has taken various forms, starting with the death penalty as the absolute punishment that had to be applied to the criminal offenders, without the possibility of individualizing the punishment. Other common punishments are the loss of free status, exile and various physical punishments such as whipping, mutilation, stamping and breaking of limbs. The first form of imprisonment in the Middle Ages did not have the same purpose as the imprisonment punishment in today's sense, since it was primarily used as a place of execution of preventive measures to ensure the presence of the defendant until the verdict was passed or executed, as so-called "court prison" and for debtors as a personal prison.<sup>1</sup> The system of deprivation of liberty, as we know it today, with different durability and severity, appeared initially at the end of the 18<sup>th</sup> century. However, it was fully formed in the second half of the 19<sup>th</sup> century when the imprisonment sentence became the most common punishment.

The question that imposes with regard to imprisonment, as well as all other sentences, is the purpose of punishing the perpetrator. Theorists are divided into those who represent absolute theories and those who represent relative theories. According to absolute theories, the purpose of punishment is retribution for the one who punishes and suffering for the one who is being punished. On the other hand, according to relative theories, the purpose of punishment is in the general social benefit (e.g. the protection of society). Moreover, the punishment has to influence on the perpetrator not to commit criminal offenses in the future, but also on the society in general. Those are the theories of special and general prevention. The third branch represents mixed theories that strive to find a compromise between absolute and relative theories, which is why their main

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<sup>1</sup> IVIČEVIĆ KARAS, Elizabeta: Penitencijarno pravo [Penitentiary law], Narodne novine, Zagreb, 2016, p. 5.

starting point is that punishment may and must have more goals such as prevention, resocialization, treatment and rehabilitation of perpetrators.<sup>2</sup>

## **2. Adoption and main characteristics of the Criminal Code of 1852**

The patent of May 27, 1852 introduced the Austrian Criminal Code into Croatia and Slavonia, which entered into force on September 1 of the same year under the name "The Criminal Code on Crimes, Misdemeanours and Contraventions". It is already apparent from the title that it has taken the three-part form of criminal offenses under the influence of French law. Crimes are classified as acts committed with an evil intent, and misdemeanours and contraventions as acts that are generally unacceptable. Accordingly, the law is divided into two parts. The punishments were very repressive, however, the number of criminal offenses for which a death penalty is prescribed was reduced. It was mostly replaced by the penalty of imprisonment. There was also intent of reducing the number of corporal punishments and the suffering and pain caused by criminal sanctions, other than those that the punishment itself must cause in order to achieve its purpose. The law was based on the theory of the free will of a man, which in assessing the causality of the offense and the perpetrator's responsibility eliminates other possible factors such as social environment, incentives from the outside etc.<sup>3</sup>

## **3. The penalty of imprisonment under the Criminal Code of 1852**

The second chapter of the Criminal Code of 1852 is devoted to crimes and it is emphasized that there are two main types of punishment: death penalty by hanging and the dungeon (e.g. imprisonment). The punishment of imprisonment was divided by severity to dungeon and heavy dungeon. The dungeon was conducted in a way that the convict was held without shackles, in solitary or group cells. The diet was determined according to the rules of the penitentiary, and the visits had to be allowed by the superior of the penitentiary. On the other hand, the heavy dungeon included shackles on convict's legs, a solitary cell and no possibility of speaking with anyone except in extraordinary cases.

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<sup>2</sup> KOVČO, Irma: Kazna zatvora – zašto i kuda? [Prison sentence – why and where?], Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, vol. 8, no. 2, 2001, pp. 119–126.

<sup>3</sup> ČEPULO, Dalibor: Hrvatska pravna povijest u europskom kontekstu [Croatian Legal History in the European Context], Zagreb, Pravni fakultet Sveučilišta u Zagrebu, 2012, pp. 158–159.

The imprisonment punishment could have been determined for a lifetime or for a limited period of time. In the second case, it could last for a minimum of 6 months and a maximum of twenty years.<sup>4</sup> Although severe and repressive from today's point of view, it could have been made even more severe by: 1) reduction of intake of food and water (e.g. the convict received bread and water three times a week, but never two days in a row); 2) a firm bed (e.g. sleeping on the wooden boards, but not more than three times a week every other day); 3) a solitary prison (e.g. separation from other convicts in a separate cell, which could not last longer than a month, but could be carried out every other month with obligatory work and the right to a two hour walk a day); 4) a solitary prison in a dark cell (e.g. as the previous sharpening, but in the darkened cell and with a limitation for the longest period of three days consecutively, possible repeating after one week and overall duration of thirty days per year); 5) flogging with rods for men or with whips for youths, under eighteen years old, and for women, after an opinion of the surgeon on the power of endurance of the offender; 6) the exile after the sentence was served, which was valid only for foreign people.<sup>5</sup>

The second category of punishable offenses were misdemeanours and contraventions, whose main characteristic is that they are not committed with an evil intent or their perpetrators are children between eleven and fourteen years old. The sentence of imprisonment in this case could have lasted for a minimum of twenty-four hours, and for a maximum of six months. There were three possible ways to carry out the penalty of imprisonment in this case: 1) without shackles, where the prisoner could choose his employment and was responsible for bearing his own costs of imprisonment; 2) without shackles, but the prisoner's diet was strictly limited according to the prison rules; 3) house jail, which meant serving a prison sentence in one's own home and under guard.<sup>6</sup>

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<sup>4</sup> ŠILOVIĆ, Josip (ed.): Kazneni zakon o zločinstvih, prestupcih i prekršajih od 27. svibnja 1852 sa zakoni od 17. svibnja 1875, o porabi tiska, o sastavljanju porotničkih imenika i o kaznenom postupku u poslovih tiskovnih, preinačenim zakonom od 14. svibnja god. 1907, o promjeni tiskovnih zakona; i sa zakoni i naredbami koji se na nje odnose ter sa rješitbami kr. stola sedmorice i vrhovnog suda u Beču [The Criminal Code on Crimes, Misdemeanors and Contraventions of 27<sup>th</sup> May 1852, including Laws of 17<sup>th</sup> May 1875 on the Printed Matters, on Compiling a List of Jurors for Jury courts and on Criminal Procedure in Publishing Offences, together with the amendment of 14<sup>th</sup> May 1907, laws and orders related to them, as well as decisions of the Table of Seven and the supreme court in Vienna], Fourth edition, Hrvatski zakoni vol. 15, Zagreb, 1921, Art. 17, p. 33.

<sup>5</sup> *Ibid.*, Art. 19, pp. 46–47.

<sup>6</sup> JOSIPOVIĆ, Igor: Funkcioniranje zatvorskog sustava u drugoj polovici 19. stoljeća [The functioning of the prison system in the second half of the 19<sup>th</sup> century], Unpublished doctoral thesis, Hrvatski studiji Sveučilišta u Zagrebu, 2018, pp. 97–98.

#### **4. Amendments to the Criminal Code of 1852**

The repressiveness of the Criminal Code of 1852, which was reflected in the harsh sanctions, was alleviated by its amendments. The punishment of flogging was abolished by the Law of the Parliament of the Kingdom of Dalmatia, Croatia and Slavonia of 1872. It abolished the punishment of flogging whether if it was determined as the main punishment, aggravated punishment or a disciplinary measure. In 1875, the Law on the abolition of shackles was enacted, which abolished shackles as a part of the heavy dungeon sentence, and it was ordered that the shackles that were being used, be removed immediately. This Law only allowed short-term chaining.<sup>7</sup>

##### **4.1. The Irish progressive system**

The Irish progressive system, also known as the Crofton's system<sup>8</sup>, was created in Ireland in 1856. In general, progressive systems prescribed the execution of the imprisonment sentence in three phases: 1) phase of the cell imprisonment; 2) phase of the congregate work of prisoners, and finally 3) phase of the conditional release. In contrast, the third phase of the Irish progressive system was a period in "intermediate prisons" with minimal supervision, during which the prisoner demonstrated his dependability and employability in the outside world. At this stage, the prisoner was placed in a special type of intermediate prison where the conditions were considerably better. The basic tendency was to prepare a convict for a life in freedom, but also for the conditional release scheduled for the next phase.

The Irish progressive system spread rapidly across Europe during the second half of the 19<sup>th</sup> and early 20<sup>th</sup> century and has been held up to the present day in contemporary penitentiary law. In 1875, the Parliament incorporated the Irish progressive system into the criminal justice system of Croatia and Slavonia. Its practical application was associated with the arrival of Emil Tauffer as the head of the Lepoglava Penitentiary in 1877, but it was formally introduced in 1878 by the Order of the Government, primarily for the Lepoglava Penitentiary. Since the system obtained great results, it was introduced in other prisons,

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<sup>7</sup> ŠILOVIĆ, Josip: Kazneno pravo. Po Dru. K. Janki [Criminal law. By K. Janka], Fourth edition, Zagreb, 1908, pp. 242–243, 250–252.

<sup>8</sup> It was named after the person who was in charge of the Irish prison reform, Sir Walter Crofton. See more in: IVIČEVIĆ KARAS, *op.cit.*, pp. 11–12.

specifically in Mitrovica, Gospić and in the women's penitentiary in Zagreb. The Order of 1878 prescribed that the imprisonment punishment was to be executed by a solitary imprisonment immediately upon the imposition of a sentence, by a collective imprisonment on the basis of the classification of the prisoners according to their characteristics and former behavior, and finally by transferring to the intermediate prison.<sup>9</sup>

#### **4.2. Conditional release**

The institution of conditional release was introduced by the Law of 1875, but the provisions of that Law were altered by the novel of 1916. According to the 1875 Law, the self-interested crime convicts, arson and lifetime sentenced convicts were ruled out from the conditional release regime.<sup>10</sup> There was a possibility of an amnesty for them after serving a certain part of the sentence that made this system seem unjust. Moreover, their position was more favourable than the position of those for which a conditional release was provided and whose sentences were less severe, that ultimately led to absurdity. In the practice, convicts who were exempt from conditional release regime lost the status of the convicts after the amnesty, and the ones subjected to conditional release were still considered as convicts. In order to overcome these shortcomings and to comply with the principle of fairness, the Law of 1875 was altered in 1916. The conditional release was finally introduced for the self-interested crime convicts, arson convicts and for the lifetime sentenced convicts. Just like today, conditional release was optional and it existed as a possibility for those convicts, who have shown the ability to rule praiseworthy and who have improved. The 1916 novel accurately states the criteria according to which it can be concluded that the convict has improved and says that "a conditional release can be given to a convict, if his former life and his diligence and behaviour during the punishment provide hope for a further praiseworthy life".<sup>11</sup> The period of conditional release was equal to the remaining part of the sentence, and if the conditional release was given to a lifetime prisoner, then it lasted for seven years in order to give him the opportunity to resocialize completely and to remove the label of a criminal. However, the conditional release could have been revoked at any time, if the convict acted badly during the conditional release or

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<sup>9</sup> ŠILOVIĆ, Josip: Kazneno pravo [Criminal law], Zagreb, 1920, pp. 183–194.

<sup>10</sup> KARLOVIĆ, Ivo: Uvjetni dopust s naročitim obzirom na naše pozitivno pravo [Conditional release, especially with regard to our positive law], Mjesečnik pravničkoga društva u Zagrebu, vol. 43, no. 1–2, 1917, p. 2.

<sup>11</sup> *Ibid.*, p. 3.

failed to comply with the obligations he was obliged to fulfil. In order to establish such circumstances, the conditionally released convicts lived under the supervision of the police, and they could not leave the place of residence without police permission. Conditional release may be revoked by the Croatian ban.<sup>12</sup>

## **5. Penalty life in Lepoglava**

In the 19<sup>th</sup> century, there were four penitentiaries in Croatia: in Lepoglava, Mitrovica, Gospić and the women's penitentiary in Zagreb. The Lepoglava penitentiary was founded in 1854 in the former Pavlin's monastery. In the period from 1908 to 1914, the intermediate prison was built alongside the penitentiary, in accordance with the Irish progressive system. According to Franjo Seifert, the administrator of the Lepoglava penitentiary at the time, the outside world saw the prisoners of Lepoglava as beasts, which are capable for any evil. In his article, he tried to show the convicts as people with weaknesses, just like those we encounter every day.<sup>13</sup> Another interesting description is the one from the law student Emanuel Latković who, in 1910, visited the Lepoglava penitentiary with his colleagues and professor Josip Šilović.<sup>14</sup> Firstly, they visited the penitentiary kitchen where the meals, mostly soups and stew, were prepared. Meat was on the menu three times a week. Rehabilitation was done by religion and education and with the help of the library. However, according to Seifert, the best method of rehabilitation is work, which must not endanger the fundamental purpose of punishment. Upon arrival in Lepoglava, the convict was placed in a solitary cell, where he performed simple tasks, such as "separating" feathers. After that, he was removed to congregated prison, where he was supposed to develop social skills through crafts and farming with other convicts. A certain award was given for the work although many did not receive anything. After this stage, the convict was transferred to the intermediate prison and finally there was a possibility of conditional release.

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<sup>12</sup> Zakon o uvjetnom otpustu kažnjenika [The Law on conditional release of convicts], Sbornik zakonah i naredabah valjanih za Kraljevinu Hrvatsku i Slavoniju, 1875, no. 23, Art. 2, p. 96.

<sup>13</sup> SEIFERT, Franjo: Slike iz lepoglavске kaznionе [Pictures from the Lepoglava Penitentiary], Mjesečnik pravničkoga društva u Zagrebu, vol. 38, bk. 1, no. 4, 1912, pp. 410–421.

<sup>14</sup> LATKOVIĆ, Emanuel: Naučna ekskurzija u lepoglavsku kaznionu [Scientific excursion to the Lepoglava penitentiary], Mjesečnik pravničkoga društva u Zagrebu, vol. 36, no. 7, 1910, pp. 616–630.

## 6. Conclusion

Despite its repressive and conservative nature, the Criminal Code on Crimes, Misdemeanours and Contraventions of 1852, subjected to numerous amendments, was valid in the Croatian–Slavonian legal area until 1930, when the Criminal Code of the first Yugoslavia came into force. Many institutes that were applied daily in the second half of the 19<sup>th</sup> century, such as shackles, flogging, lifetime prison and the death penalty, are no longer included in contemporary Croatian criminal law. Death penalty was finally abolished by the Constitution of the Republic of Croatia of 22 December 1990. The conditions in today's prisons are more appropriate to the dignity of every human being, and various programs, work and workshops are organised to resocialize convicts so that one day they will be re-accepted in the society. Today's criminal law, apart from conditional release, knows a suspended sentence as an institute that allows a perpetrator who has been sentenced to a particular punishment to be released from the execution of this sentence if he does not commit a new offense during the probationary period and performs certain obligations.<sup>15</sup> In general, criminal systems throughout the world today are primarily oriented towards the rehabilitation of the perpetrator and to the special and general prevention rather than retribution for the committed crime. Thus, under the Art. 41 of the Criminal Code of the Republic of Croatia, the purpose of punishment is to "express public condemnation of the committed criminal offence, raise the confidence of citizens in the legal order based on the rule of law, exert an influence on the perpetrator and all others so that they do not commit criminal offences by raising awareness of the perils of committing criminal offences and of the fairness of punishment and allow the perpetrator's readmission into society".<sup>16</sup>

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<sup>15</sup> Kazneni zakon Republike Hrvatske [The Criminal Code of the Republic of Croatia], Narodne novine 125/2011, no. 2498, Zagreb, Art. 56.

<sup>16</sup> *Ibid.*, Art. 41.

# **Ivana KUNIĆ: Criminal Proceedings against Juvenile Offenders in Croatia and Slavonia at the turn of the 19<sup>th</sup> to the 20<sup>th</sup> century**

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## **1. Introduction**

Juvenile criminal law regulates the legal position of juveniles in criminal legal matters, which is especially sensitive field of regulation, considering the involvement of persons whose age does not provide mental and physical maturity of adults, so they cannot be treated in the same way as adult offenders. The purpose of this paper is to briefly show the development of the legal position of a juvenile offender through history, especially in Croatia and Slavonia at the turn of the 19<sup>th</sup> to the 20<sup>th</sup> century. During this period, much attention has been focused on the juvenile offender. Reformers were convinced that the adult justice system was a total failure at addressing the newly discovered problem of juvenile delinquency. The purpose of special sanctions imposed on juveniles was correction and rehabilitation rather than punishment. Also, the idea developed that juvenile delinquents required different proceedings from those prescribed for adult offenders.

## **2. Legal position of juvenile offenders through history**

Even the oldest legal sources, such as the Code of Hammurabi and Laws of the Twelve Tables, show the existence of a special legal position of juvenile perpetrators of criminal offences in comparison with adult offenders.<sup>1</sup> The most relevant written source, Code of Justinian issued in 529, divides juvenile offenders into three categories with appropriate legal position: 1) *infants*, i.e. children up to 7 years of age, which could not be held liable; 2) *infantae proximi*, i.e. children between the ages of 7 and 10, which were presumed to lack criminal capacity, and they could be punished only if it is proven that the child knew and understood the consequences of his act, and 3) *pubertati proximi*, i.e. children from ten to

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<sup>1</sup> RITTOSSA, Dalida; BOŽIČEVIĆ-GRBIĆ, Melita: Zakon o sudovima za mladež – reformski zahvati i praktične dileme [Juvenile Courts Act – Reform Interventions and Practical Dilemmas], Hrvatski ljetopis za kazneno pravo i praksu, vol. 19, no. 2, 2012, p. 616.



fourteen years of age, which were presumed capable for criminal responsibility until proven differently. The last two categories of juvenile offenders were subjected to less grave punishments or excluded from the death penalty. Even so, the rule "malice supplements age" enabled the treatment of juvenile delinquents equivalent to adult offenders.<sup>2</sup> Rules on the sanctioning of young offenders can be also found in *Constitutio Criminalis Carolina* from 1532. This Law recognised the limited criminal responsibility for young persons, which is evident from the provision on punishment of thieves under the age of fourteen. In this case the death penalty was excluded and corporal punishment was applied. But, the possibility of using the rule "malice supplements age" remained, which meant that alleged young thieves were still unprotected from sentencing the capital punishment.<sup>3</sup>

The period at the turn of the 18<sup>th</sup> to the 19<sup>th</sup> century was marked by *discernimento*, an institute introduced by the Criminal Code of Leopold of Tuscany in 1785, which under the influence of the French criminal law became part of many European criminal laws.<sup>4</sup> In Croatia and Slavonia, the Austrian Criminal Code of 1852 did not apply *discernimento*, while Derenčin's draft supposes it. Defined in its simplest terms, *discernimento* signified juvenile's intellectual ability to understand the severity of the acts he has committed, i.e. his ability to distinguish right from wrong. Thanks to *discernimento*, there has been a clear definition of the legal position of juvenile offenders, which is based on irrefutable presumption that the age can reflect on the ability of a juvenile to distinguish right from wrong on account of insufficient mental development.<sup>5</sup> The characteristics of *discernimento* are visible in the example of French Criminal Code of 1810 (the so-called Code Napoleon). The assigned jurisdiction of the court was to determine whether or not the juvenile acted with *discernimento* (that is the ability to discern right from wrong). In the case of crimes committed without *discernimento*, the juvenile was acquitted. Crimes committed with *discernimento* were instead necessarily punished, though sentences were reduced as compared to adults.

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<sup>2</sup> CARIĆ, Ante: Mlađe osobe u kaznenom pravu (počinitelji i žrtve) [Young Persons in Criminal Law (Offenders and Victims)], Pravni fakultet u Zagrebu, Zagreb, 2002, pp. 1–2.

<sup>3</sup> RITTOSSA; BOŽIČEVIĆ-GRBIĆ, *op. cit.*, p. 620.

<sup>4</sup> CARIĆ, *op. cit.*, pp. 2–3.

<sup>5</sup> RITTOSSA; BOŽIČEVIĆ-GRBIĆ, *op. cit.*, p. 623.

At the turn of the 19<sup>th</sup> to the 20<sup>th</sup> century, due to the work of the sociological school of criminal law, the ideas of education and correction were entering criminal legislation, which gradually brought to disappearing of *discernimento* as criteria of punishing juveniles. The last one to abolish it was France in 1942.<sup>6</sup> In the period of the development of first specialized correctional institutions for youths in the mid-19<sup>th</sup> century, the idea developed that the procedures for juvenile justice proceedings should differ from those of the adult criminal justice system. The first special courts for juvenile offenders have been established in the Federal State of Illinois in the United States of America, not as independent courts, but as regular courts to conduct the special procedures in juvenile cases. The idea has spread across almost all American federal states by the end of the 1950s, and at the same time some European countries have started to introduce special organisation units for prosecuting juveniles passing special laws.<sup>7</sup>

### **3. Development of legal position of juvenile offenders in Croatia and Slavonia until the first half of the 20<sup>th</sup> century**

There is little information about the medieval legal position of juvenile delinquents in Croatia and Slavonia, which brings us to the conclusion that their position did not differ from the position of adult offenders. However, statute books of Dalmatian and other coastal towns, such as the Korčula statute from 1214, the Dubrovnik statute from 1272, the Split statute from 1312 and the Rijeka statute from 1510 included several regulations on juvenile offenders regarding the obligation of their milder punishment.<sup>8</sup>

#### **3.1. Criminal Code on crimes, misdemeanors and contraventions of 1852**

Special provisions for juveniles were introduced to the Criminal Code on crimes, misdemeanors and contraventions of 1852, which entered into force in Croatia and Slavonia on September 1, 1852. Significant change in the area of juvenile criminal law was made by prescribing three categories of juvenile perpetrators. The first category refers to

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<sup>6</sup> CARIĆ, *op. cit.*, pp. 5–6.

<sup>7</sup> CARIĆ, Ante; KUSTURA, Ivana: Sudovi za mladež: ustrojstvo, sastav i nadležnost prema Zakonu o sudovima za mladež [Youth courts: structure, composition and jurisdiction pursuant to the Youth Court Act], Hrvatski ljetopis za kazneno pravo i praksu, vol. 16, no. 2, 2009, pp. 857–860.

<sup>8</sup> CARIĆ, *op. cit.*, pp. 8–9.

children up to the age of 10. They could not be held liable, regardless of the gravity of the committed criminal act, because of their lack of development of social and mental capacity. Punishments imposed by criminal law were not applied, so their punishment was left to the discretion of their family. That actually means that the age of criminal responsibility was fixed at the age of 10. The second category refers to children between the ages of 11 and 14. They were held liable, and because of their immaturity received less grave punishments. The Criminal Code explicitly prescribes that no crime exists when the perpetrator is less than 14 years old. Therefore, major criminal offences (i.e. crimes) committed by those juveniles were punished as contraventions. They were punished by detention in correctional facilities separate from adults, lasting from one day to six months. During detention, the juvenile convicts were employed in work according to their physical capacity, and they were given spiritual education by priests. Unfortunately, the main problem was that Croatia and Slavonia at that time did not have correctional facilities specialized for juveniles, so they were often placed in the same facilities with adult criminals. This was far from the idea of education and rehabilitation of needy youth.<sup>9</sup> Meanwhile, for minor offences (i.e. misdemeanors and contraventions) punishment of juveniles aged 11–14 was left to their family. The third category refers to juveniles above the age of 14 years. They were treated as adults, but with some exceptions. Namely, the Criminal Code explicitly prescribes that persons under the age of 20 cannot be punished with death penalty or lifelong imprisonment. The maximum punishment for persons between 14 and 20 years of age was imprisonment from 10 to 20 years.<sup>10</sup>

Professor Šilović criticized provision of the Criminal Code of 1852 because of use of the age of criminal responsibility as the upper limit of absolute criminal incapacity. He thought that setting a firm limit between criminal capacity and incapacity cannot be justified, and that the criminal capacity of a person depends upon age, but also upon many circumstances, such as person's characteristics, nature of the crime etc.<sup>11</sup>

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<sup>9</sup> ŠILOVIĆ, Josip: Kazneno pravo [Criminal law], Zagreb, 1920, p. 92.

<sup>10</sup> ŠILOVIĆ, Josip: Kazneno pravo. Po Dru. K. Janki [Criminal law. By K. Janka], Fourth edition, Zagreb, 1908, pp. 131–132.

<sup>11</sup> *Ibid.*, pp. 131–133.

### **3.2. Derenčin's draft**

In 1879, Marijan Derenčin, a prominent Croatian lawyer, drafted a Criminal Code Draft known as Derenčin's draft, whose content, in relation to the Austrian Criminal Code of 1852, made many improvements. The Draft, which was never enacted, recommended a further raise of the age of criminal responsibility from 10 to 12 years. Furthermore, juveniles who at the time of committing offence were aged between 12 and 16 years, could be punished only if they were mature enough to understand the differences between right and wrong and the meaning of criminal act. Therefore, the application of *discernimento* was prescribed. Juveniles aged 17 years were presumed to possess "ability to reason".<sup>12</sup>

### **3.3. The law on the Forceful Upbringing of the Immature of 1902**

The law on the Forceful Upbringing of the Immature was brought in 1902 on the initiative of professor Šilović, who was trying to resolve the problem of neglected children, forced to commit a criminal offence to survive. He found the solution in establishing special temporary sheltering and reeducation institutions where juvenile delinquent would learn how to become a responsible citizen. At the same time, the crime rate should decrease and public safety increase, which would have an effect on the prosperity of the whole society. As an example of good practice, Šilović gave the example of England, where in 1869 10.314 juveniles have been convicted and, after establishing such institutions in 1891, the number dropped significantly to 3.855. Their solution was based on the assumption that a child, regardless of committing a criminal act, cannot be guilty because of the lack of mental maturity.<sup>13</sup>

The measure of forceful upbringing was aimed at minors less than 14 years of age, because of negative experiences in attempts to influence persons over that age, and because of the danger that a big age difference would have negative impact on the education. The Law does not regulate the minimal age limit, but considers the age corresponding the age of attending compulsory education. Also, forceful upbringing was not suitable for those who have permanent and bad illnesses, such as tuberculosis or

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<sup>12</sup> CARIĆ, *op. cit.*, pp. 9–10.

<sup>13</sup> ŠILOVIĆ, *Kazneno pravo, Po Dru. K. Janki, op. cit.*, p. 131.

incurable infectious skin diseases, on grounds of possible disturbance of the order and affecting the hygiene of the institution.<sup>14</sup> Duration of this measure is not set in advance, and it can last up to the age of 18, which actually means until the authorities make the decision of release.

General requirement for the application of this measure and placing minor in an institution was his neglected upbringing, i.e. that minor had committed a criminal offence or had given himself to roaming, loitering or begging, leading thus to the minor's neglect. The application of this measure to those minors who were not offenders, but fulfilled other conditions, gave the opportunity of an intervention in the pre-delict state of children who reached the age of 14 years.<sup>15</sup> On forceful upbringing of those minors, who did not have broken the criminal law, decided a tutorial court on the proposal of authorized persons (e.g. parents). Decision in regard to minors, who should be punished for the criminal offence, was brought by criminal court on the proposal of the State Attorney's Office. Forceful upbringing was conducted under the supervision of public authorities, in suitable families, in private or public correctional institutions.<sup>16</sup>

### **3.4. The Viceroy's Order on punishment and protection of Youth of 1918**

The Order of the Viceroy of Croatia, Slavonia and Dalmatia on punishment and protection of Youth of 1918, which came into force in 1919, was very important for the further development of juvenile criminal law. By this order, which was valid from 1919 to 1930, the matter of punishment and protection of youth was systematically regulated by a single act. The fact that a similar law for juveniles was brought in Germany as late as 1923 speaks of the importance of this Order.<sup>17</sup>

The order contains detailed provisions of criminal and procedural law, which were applied to juveniles from 14 to 18 years of age. In comparison with contemporary juvenile court laws, we can conclude that the Order can be considered a predecessor of a separate

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<sup>14</sup> CUVAJ, Antun: Građa za povijest školstva kraljevina Hrvatske i Slavonije od najstarijih vremena do danas [The Material for the History of Education in the Kingdoms of Croatia and Slavonia from the Earliest Times to the Present], vol. 10, Trošak i naklada Kr. hrv.-slav.-dalm. zem. vlade Odjela za bogoštovlje i nastavu, Zagreb, 1913, p. 616.

<sup>15</sup> CARIĆ, *op. cit.*, p. 10.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

juvenile legislation. It included, among other things, the idea of a special court for juveniles. Special departments of county courts, juvenile courts, were provided. Their jurisdiction encompassed all criminal offences, i.e. crimes, misdemeanors and contraventions, prescribed by the Criminal Code of 1852, and committed by juveniles of 14 to 18. Juvenile courts also had jurisdiction over adults, who had committed a criminal offence against children and juveniles. Juvenile court judges and prosecutors were appointed by the Croatian ban. They were chosen among most experienced judges for the period of 3 years, with the possibility of reelection. The procedure of first instance was carried out by a single judge, who had a wide scope of authority in all stages of the procedure: conducting inquests, ensuring the enforcement of upbringing and educational measures, choosing trusted people to help him in the proceedings and report to him. The Order also contains a number of very advanced procedural rules. For example, hearings were secret, for specific criminal cases the application of the purpose principle was allowed, the procedure was conducted in a room separate and removed from the rooms for adults.<sup>18</sup> The law on the Forceful Upbringing of the Immature of 1902 and the Viceroy's Order of 1918 were in force until January 1, 1930, when the Criminal Code and the Code of Judicial Criminal Procedure of 1929 were issued during the Kingdom of Yugoslavia. Both codes, especially the latter, took over a number of provisions and solutions from the Viceroy's Order of 1918. The important change in juvenile criminal legislation has occurred after the World War II, within the new state of Yugoslavia, when the legal position of juvenile offenders became quite unfavorable.<sup>19</sup>

#### **4. Conclusion**

The period from the 19<sup>th</sup> to the 20<sup>th</sup> century is of great importance for the development of juvenile criminal justice system in Croatia and Slavonia. During this period, the understanding that juvenile delinquents cannot be treated in the same way as adult offenders has prevailed. The causes of juvenile delinquency come from the broader social environment: the family and neighborhood. The idea that causes of delinquency were external to the individual led to the belief that delinquency was an illness brought on by

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<sup>18</sup> CARIĆ; KUSTURA, *op. cit.*, p. 863.

<sup>19</sup> CARIĆ, Ante: The juvenile justice system in Croatia, European juvenile justice systems, vol. 1, Giuffrè editore, Milan, 2007, p. 40.

the social diseases of poverty, parental neglect ignorance, and urban decay. These causes were beyond the control of the juvenile, so the primary purpose of the juvenile justice system was not punishment but rehabilitation. This resulted in the adoption of special juvenile justice system, whose provisions are also contained in today's legislation.

# **Gréta ZANÓCZ: The Similarities between Jury Trial and People's Court in the Hungarian Legal History**

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## **1. The development of the criminal courts in Hungary**

In Hungary from the foundation of the Kingdom till the beginning of the 16<sup>th</sup> century, the king was the only who exercised the criminal judicial power, later jointly with the royals, because of the increase of the related cases. Because of it, the palatine, the high judge (*iudex curiae regis*), the chancellor and the personalis also got the criminal judicial power. Beside ordinary courts, extraordinary courts also existed, which task was to judge above the inferiors – over whom the King did not judge personally. The Holy See operated by privilege since 1222 and it caused further differentiation to the court system. This structured organization system hadn't been changed by the further legislation. Because of it, the district courts, the city courts, the hallmoot and other special courts judged at first instance until the 19<sup>th</sup> century. While at on a higher level, the higher regional court and the *Excelsa Tabula Septemviralis* judged.<sup>1</sup>

## **2. Struggle for the institutionalizing of the jury trial**

The views on the founding of the jury trial first appeared in Hungary as a result of the French Revolution.<sup>2</sup> At that time there were some opinions, which wanted to change the obsolete feudal judicial system, but this was not yet possible in this period of Hungarian legal history. For all this, the first decades of the 19<sup>th</sup> century gave a realistic chance, since at that time, among the demands for civil transformation there were arguments beside the

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<sup>1</sup> ANGYAL, Pál: A magyar büntetőeljárás jog tankönyve [The textbook of the Hungarian Criminal Procedure] Budapest, 1915, Athenaeum Irodalmi és Nyomdai R.T., pp. 25–27.

<sup>2</sup> BOTH, Ödön: Küzdelem az esküdtbíráskodás bevezetéséért Magyarországon a reformkorban és az 1848. április 29-i esküdtszéki rendelet. [Struggle for the introduction of the jury in Hungary in the Reformation and the Jury decree of 29 April 1848] [http://acta.bibl.u-szeged.hu/6293/1/juridpol\\_007\\_fasc\\_001\\_001-060.pdf](http://acta.bibl.u-szeged.hu/6293/1/juridpol_007_fasc_001_001-060.pdf) [Access March 16, 2018].



establishment of the jury trial, which meant the participation of the people in the judiciary.<sup>3</sup>

In the 1840s, the demand for institutionalization of the jury trial was one of the main program points of the liberal opposition.<sup>4</sup> The introduction of the jury trial was first discussed by the national council whose main task was to develop a punitive and corrective system, on the basis of Act 5 of 1840. However, the speakers in favor of jury trial remained in minority, although they have convinced the council of the expediency and necessity of the jury trial. Afterwards the Lower House has ordered the conversion of the system of the criminal procedure, in this proposal the jury trial was placed – it was prevented by the Upper House.<sup>5</sup> Thus, the first attempt to set up the jury trial – despite of its progressive spirit – has failed.

Finally, the events of the Revolution and War of Independence of 1848 had led to the introduction of the institution of the jury trial in Hungary. However, the jury trial's competence was limited to judging press offenses, and in addition to the rushing events of the Revolution and War of Independence, this competence has not been extended. In this way, based on the Act 18 of 1848 the institution of the jury trial was introduced in Hungary, although in a limited way. The Act 17 of 1848 stated: „Over the libels the jury trial judge in public.“ The parliament concluded on 14<sup>th</sup> of December in 1848 to „make the review of the Criminal Code which was created by the past parliaments and to adapt it to the current conditions based on the jury trial decision“.<sup>6</sup> However after the failing of the Revolution and the War of Independence that mandate was not completed and the Act 18 of 1848 was repealed by the Austrian Monarchy.<sup>7</sup> Finally, the institution of the jury trial was renewed by the Order No. 307/1867 of the Minister of Justice.<sup>8</sup>

None of the proposals – which aim was to establish a single Criminal Code – of Károly Csemegi in 1882 and 1886 and of Fabinyi Teofil in 1889 included changes extending the competence of jury's. The Code of Criminal Prosecution came into force by the Act 34

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<sup>3</sup> CSIZMADIA, Andor: Az esküdtbíróság Magyarországon a dualizmus korában [The jury in Hungary in the era of dualism] In: Jogtörténeti Tanulmányok I. Budapest, 1966, Közgazdasági és Jogi Könyvkiadó, p. 131.

<sup>4</sup> *Ibid.*

<sup>5</sup> BEREND, György: A népbíráskodás [The People's Court]. Szeged, 1948, Acta Universitatis Szegediensis, pp. 129–131.

<sup>6</sup> CSIZMADIA, *op. cit.*, p. 132.

<sup>7</sup> BEREND, *op. cit.*, pp. 129–131.

<sup>8</sup> CSIZMADIA, *op. cit.*, pp. 132–133.

of 1897, before the Act 33 of 1897 on jury trials was accepted.<sup>9</sup> Regarding the institution of the jury trial a further legislative result was the Act 13 of 1914, which aim was to reduce the practical mistakes of the jury. After World War I in 1919 a ministerial decree suspended the operation of the jury but this provisional decision happened to be final as the jury trial was not re-activated.<sup>10</sup>

### **3. The organization of the jury**

The fundamental difference in the organization of the criminal courts is that who judges the case. Only the qualified, professional judges are involved in the criminal proceedings, or in the criminal cases, the reasonable and independent members of society may also contribute. The functioning of the jury trial is a fundamental example for the involment of the lay element.<sup>11</sup> By institutionalizing the jury, the legislators wanted to achieve the fullest possible enforcement of material justice and wanted to promote the participation of society in the judiciary. „With the enlargement of the guarantees of judicial independence the constitutional aspects could be more fully implemented.”<sup>12</sup> However there are several arguments for the „exclusive jurisdiction of a qualified judicial official system”<sup>13</sup> such as the principles of legality, professionalism, uniformity and certainty of the judiciary.

In the Hungarian criminal justice system prevailed the conception that a judicial body of purely specialist judges should be a legal remedy for decisions of lay judges. However, the main purpose of involving laymen was to redound and to facilitate the decision making of the criminal courts. These are the arguments for the existence of the jury: „the real owner of the state power is the nation and because of it, it can participate in the exercise of judicial power”,<sup>14</sup> and with this, it can promote the rule of constitutionality. With its application the material justice can be efficiently prevailed, which is the most important principle of the criminal lawsuit. By the application of the jury it is easier to implement the honouring of the motives, which means that the jury can judge fairly and

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<sup>9</sup> *Ibid.*, p. 133.

<sup>10</sup> BEREND, *op. cit.*, p. 131.

<sup>11</sup> FINKEY, Ferencz: A magyar büntető perjog tankönyve [The textbook of the Hungarian Criminal Procedure] Budapest, 1916, Grill Károly Könyvkiadóvállalata, p. 119

<sup>12</sup> ANGYAL, *op. cit.*, p. 65.

<sup>13</sup> FINKEY, *op. cit.*, p. 119.

<sup>14</sup> *Ibid.*, p. 120.

strictly more efficiently, than the professionals. Another advantage of the jury trial is, that it "allows the prevailed of the principle of immediacy".<sup>15</sup>

The jury trial model which was applicated in Hungary was copied from the French model, with attention to the Austrian and German model. According to this, at every district court which had criminal competence worked one jury trial. Because of its external organization it was a mixed court, it contained two bodies, a professional body with three members and the jury with twelve members. The president express the inhesion of the two bodies who is partly the president of the council of the professional judges and the leader for the juries.<sup>16</sup> The jury usually met on ordinary sessions, ecceptionally there also could be ordered extraordinary session. Because of it, the two bodies of the jury (i.e. the professional body and the jury) worked together only at the public hearing. In spite of this, the professional body had the chance to decide without the members of the jury. The cooperation of the two bodies was manifested at the public hearing, because it was hold uniformly before them. Furthermore, after the evidentiary process the professional body composed the questions, which should be decided by the members of the jury and in the case of conviction, the two bodies jointly decided it.<sup>17</sup> The president of the jury and its deputy were designated by the president of the Royal Judgement Board. And the two other members – who worked beside the president of the professional body – were designated by the president of the royal district court.

#### **4. Judicial persons**

In criminal cases the jurisdiction is „exercised by the state through natural persons, who use the power got by the state among the frames of the law at a specified area singly and in a council”.<sup>18</sup> In the Hungarian criminal judicial system among the permanently applied professional judges worked the members of the jury, who participated in the practice of the criminal authority on a case-by-case basis. However only those people could exercise the judicial power who met some regulated requirements. The professional judges should

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<sup>15</sup> FINKEY, *op. cit.*, pp. 120–122.

<sup>16</sup> KOVÁCS, Kálmán: A magyar büntetőjog és büntetőeljárás jog története 1848-tól 1944-ig [The history of the Hungarian Criminal Law and Criminal Procedure Law]. Budapest, 1971, Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kar Magyar Állam- és Jogtörténeti Tanszék, p. 68.

<sup>17</sup> ANGYAL, *op. cit.*, pp. 70–71.

<sup>18</sup> ANGYAL, *op. cit.*, p. 138.

have met those requirements which were regulated in the Act 4 of 1869, Act 17 of 1891, Act 7 of 1912 and Act 53 of 1913.

Based on these regulations a professional judge could be an irreproachable Hungarian male citizen, who was at least at the age of twenty-six, was not under bankruptcy or neglect, knows the Hungarian language and has the theoretical and practical qualifications required by law. Thus, he has completed his studies in law and has at least three years of law practice, has passed the uniform judicial examination and has completed two years of practice after passing the exam. The professional judges got their mandate for a specific court for an uncertain time. The professional judges were appointed by the king after the proposal of the Minister of Justice. Before they filled their position it was necessary to swear the oath, in the absence of that, they could not have exercised the state's criminal power. The person appointed to the judicial position without these conditions was the *judex incapax*, whose judicial behavior was invalid. In criminal matters, judges' proceedings were further limited by the rules which led to them being unable to take part in the concrete case in the event of suspicion of interest or bias. These relative causes of absence were distinguished by criminal law into two types *judex inhabilis* and the *judex suspectus*.<sup>19</sup>

The members of the jury – contrary to professional judges – filled their position not because of their profession. However there were also some legal obligation for being a member of the jury. Everyone who fulfilled these obligations was bounded to exercise the criminal justice, because it seemed to be a public duty. Based on the law on the juries, member of the jury could be a Hungarian citizen who was at least twenty-six years of age at the time when the basic register was matched, understood the official language of the state and fulfilled the conditions of the financial and intellectual censorship. However, the law also ordered some negative criteria, such as the principles of incompatibility and indignity which were disqualifying reasons.<sup>20</sup> The people who fit to the legal conditions were able to be a jurymen, however to qualify them as a jurymen, it was necessary to have them assigned judicial authority. As part of this procedure, they had to be included in the list of laymen. And those laymen who were on that list were processed to the jury trial, where they were made a jury. The right of the jury's to judge eliminated – without

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<sup>19</sup> *Ibid.*, pp. 140–145.

<sup>20</sup> *Ibid.*, pp. 146–149.

effecting their ability on judging – at the end of the term, in case of the death of the juryman and in case of dismissal.<sup>21</sup>

## 5. The People's Court

The preparations for war and later the World War I had an extremely negative impact on the evolution of criminal procedural law. As a consequence of this militarization, the jury was suspended and an impeachment was imposed in 1919. After the rejection of the Hungarian Soviet Republic, the primary task became the criminal law enforcement. This, however, has been associated with the elimination of the existing safeguards and the suppression of any advanced political view.<sup>22</sup> From the late 1930s, the state repeatedly used the methods of the prosecution to "suppress the working class, the progressive forces, and the anti-fascist movement".<sup>23</sup> This is how the Act 2 of 1939 resulted in the introduction of a martial law by which the government was empowered to impose unanimity in order to guard the integrity of the country. „In these years, again, there was more and more space for judicial arbitrariness, largely the formal guarantees of personalization that were provided by the Criminal Code in the proceedings were also eliminated.“<sup>24</sup>

As a result of a government decree issued on January 23, 1945, the Temporary National Government introduced the institution of people's jurisdiction in Hungary. In the introductory section it was justified for the early accusation of war criminals and non-war criminals. Thus, the functionality of the People's Courts were linked to the establishment of dispatches that were legally re-introduced, but their institutionalization did not take place.

The Order No. 81/1945 of the Prime Minister establishing People's Courts provides a wide range of powers for the People's Courts. It also determined punishments that did not count as criminal offenses earlier, thus violating many criminal law principles, including the prohibition of retroactive effect. The jurisdiction of the People's Courts extended to members of both civilian and armed forces, they could impose on a wide scale penalties. Article 11 defined the range of war criminals, so war criminal was the person who led

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<sup>21</sup> *Ibid.*, pp. 149–156.

<sup>22</sup> KOVÁCS, *op. cit.*, pp. 76–81.

<sup>23</sup> *Ibid.*, p. 80.

<sup>24</sup> *Ibid.*, p. 81.

Hungary to World War II, who prevented the ceasefire from serving the „nyilas“-movement<sup>25</sup>, and who, in his occupation of the occupied territorial population, seriously violated international law who urged the continuation of the war and who entered the German armed service or acted as an informer.<sup>26</sup>

Thus, the primary purpose of the People's Court in Hungary was strict prosecution rather than retaliation.<sup>27</sup> This was later replaced by the deception of politicians in the political world between the two World Wars. Thus, anyone who had any function in the Horthy respectively the Szálasi era could be brought before the court.<sup>28</sup> Judicial proceedings were made with the participation of lay people, without, however, bringing back the institutional system of the jury court. Although the preamble of the Order No. 81/1945 was about the possibility of resuming the jury, this was not done, and the system of non-judicial systems survived. The difference between the two institutions is justified by the different political and historical origins. While the jurisdictions have emerged as a result of the civil transformation as opposed to the arbitrariness of feudalism and the religious privileges. Until then, the non-judiciary was a judicial organization with the participation of the people, which was established for political purposes, such as war crimes.<sup>29</sup>

## 6. The People's Court organization

After World War II, political forces tried to delimit newly established tribunals or the former "class courts"<sup>30</sup>. Although "people's tribunals were class tribunals, more precisely, they were class coalition courts".<sup>31</sup> However, they protected the interests of not only one class, but the entire "working Hungarians". When institutionalizing non-judicial bodies, anti-fascist

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<sup>25</sup> The Arrow Cross Party (Hungarian: Nyilaskeresztes Párt) was a far-right fascist party led by Ferenc Szálasi, which formed a government in Hungary known as the Government of National Unity. They were in power from 15 October 1944 to 28 March 1945. During its short rule, ten to fifteen thousand civilians (many of whom were Jews and Romani) were murdered outright and 80,000 people were deported from Hungary to various concentration camps. After the World War II, Szálasi and other Arrow Cross leaders were sentenced as war criminals by Hungarian courts.

<sup>26</sup> KARSAI, Elek: Ítélt a nép [People judge]. Budapest, 1977, Kossuth Könyvkiadó, pp. 12–13.

<sup>27</sup> LUKÁCS, Tibor: A magyar népbíróági jog és a népbíróságok 1945–1950 [The Hungarian Law of the People's Court and the People's Courts in 1945–1950]. Budapest, 1979, Közgazdasági és Jogi Könyvkiadó – , Zrínyi Kiadó, p. 98.

<sup>28</sup> MEZEY, Barna (ed.): Magyar jogtörténet [Hungarian Legal History]. Budapest, 2007, Osiris Kiadó. p. 255.

<sup>29</sup> LUKÁCS, *op. cit.*, pp. 284–292.

<sup>30</sup> *Ibid.*, p. 109.

<sup>31</sup> *Ibid.*

political forces agreed, that responsibility should not be subjected to specialized courts, with the involvement of lay persons.<sup>32</sup> Thus, in the people's courts, the layman was also placed, but not as it was in the jury model.

The influence of the People's Courts was due to the evaluation of war and anti-communist crimes, which was not a legal but a political issue, so the representatives of the parties that „fought for the birth of a democratic Hungary”<sup>33</sup> also belonged to the organization system. The contemporary conception is well reflected in Kálmán Kovács's speech before the National Assembly: „The members of this court who are from a wide range of people are perhaps legally laureates – so they sit beside them as legal advisors, the head of the council – but not lay people in the interests of the country against the perpetrators.”<sup>34</sup> Thus, the composition of the people's courts was characterized by the country's particular political situation.

As a result, as regulated by Article 39 of the Order No. 81/1945, members of the five political parties were members of the national court judgments serving in the courts of national courts. The parties were the following: the Hungarian National Independence Front, the Civic Democratic Party, the Independent Smallholders – Farmer and Civil Party, the Hungarian Communist Party, the National Peasant Party and the Social Democratic. With this set of councils, they resolved the longstanding and still unanswered question of which party would be able to govern the country.

It was the Minister of Justice who had to decide how many councils of people had to be organized within the framework of a people's tribunal. The parties had to propose five ordinary and alternate members. The convocation leader nominated the ordinary and alternate members of the National Council of the People's Court on the nominee of the party, so that each political party would be represented. If a party did not have a candidate, then another democratic party could also have been promoted. In the absence of such party, the convocation leader was entitled to designate non-party persons as well. However, based on the NBR, a person could not be a judge if he/she was convicted of a criminal offense or a fascist act. The people's judges were remunerated on a trial day. The

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<sup>32</sup> KOVÁCS, Kálmán: A magyarországi népbíróóságok történetének egyes kérdései [Some questions of the history of Hungarian People's Court] In: Jogtörténeti tanulmányok, Volume I. Budapest, 1966, Közgazdasági és Jogi Könyvkiadó, p. 163.

<sup>33</sup> LUKÁCS, *op. cit.*, p. 113.

<sup>34</sup> KOVÁCS, *op. cit.*, p. 163.

Party delegating them – though this was not regulated by the NBR, but in practice – had the right of recall. The appointed National Judge could not refuse the designation, and after three months of operation he would have been able to apply for his release from the convocation leader. In addition to these secular elements, the Minister of Justice has appointed a qualified counselor and deputy judge. The Chief Justice was responsible for preparing, conducting, and constructing the trial. However, judgment and judgment itself were the duty of the people's judge.<sup>35</sup>

The rules regarding the National Criminal Court set up by the Order No. 81/1945, were modified by the Order No. 1440/1945 of the Prime Minister. As a result, the councils of five people, which had been formed earlier, were replaced by councils of six members, as members of the National Trade Union Council were also included among the members. In addition, the order abolished all the rights of the convocation leader in respect of the people's tribunals and maximized the mandate of the people's narratives for three months, which was repeatable with the same amount of time.<sup>36</sup> The order also regulated the possibility of appeal, according to which „the convicted person was sentenced to death penalty, total confiscation or loss of employment, and three years' imprisonment, against a fine of 20000 pengő punishment, for the sake of the acquittal of the citizen or, in any case, appeal to life“.<sup>37</sup> The appeal was submitted to the National Council of People's Courts (NCPC), the composition of which differed from that of the People's Court. In NCPC advice, the five coalition parties have delegated a regular or alternate member of the judiciary or lawyer, so judges in NCPC have been judged.<sup>38</sup>

By providing an opportunity to appeal, the legislature sought to eliminate the fact that the various people's tribunals, with the political viewers of the political spectrum, are generating other practices to overcome war and anti-popular crimes. However, the practice disagreed with this view, since people's judges mainly had a better political insight in judging a case than NCPC's advice from qualified judges. Thus, by the pressure of early public opinion, the law enforcement finally abolished the possibility of appeals against the judgments of the tribunals and "organized the complaint as an annulment

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<sup>35</sup> LUKÁCS, *op. cit.*, pp. 113–114.

<sup>36</sup> *Ibid.*, p. 115.

<sup>37</sup> KOVÁCS, *op. cit.*, p. 166.

<sup>38</sup> LUKÁCS, *op. cit.*, pp. 115–117.



complaint".<sup>39</sup> The establishment of the personality of the people, the beginning and the emergence of their work constituted a serious task for the reigning power, however, with the reduction of the cases, their operation became increasingly unnecessary. Finally the institutional justice of the People's Courts was gradually abolished by the Minister of Justice in 1948–49.<sup>40</sup>

## **7. Conclusion**

During the Hungarian legal history, both in the jurisdictions of the jury and in the institutionalization of the people's court there was a possibility of judging by lay members. But legislation before a judicial forum has not proved a longlasting solution in Hungarian history. It is strange to involve the laic element in the judiciary process from the domestic judiciary system. Finally, the Criminal Procedure Act of 1897 instituted the organization of disputes. However, during the two decades of jury proceedings, they could not have the effect of addressing this institution further. They wanted to institutionalize a system similar to that of the courthouse model. Since this organization was created for purely political purposes, it could not remain unchanged in the future. Thus, perhaps because of the negative functioning of the People's Courts, the judgments with the participation of lay people could not be institutionalized during subsequent codifications, despite the fact that many liberal thinkers tried to resurrect judgments with the inhabitants again. These trials have so far proved unsuccessful.

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<sup>39</sup> KOVÁCS, *op. cit.*, p. 167.

<sup>40</sup> *Ibid.*, p. 171.

# **Maria ŽAMBOKI: History of Jury Trial in Croatian Lands (1848–1918)**

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## **1. Introduction**

A jury trial is a legal procedure in which a jury makes findings of fact and the decision on innocence or guilt in criminal cases. It is distinguished from a bench trial in which the judge takes on both roles: that of the finder of fact and decides questions of law. The use of jury trials evolved within common law system. In continental Europe it started in France by the time of the Revolution in 1789 and was adopted from England. French regulations had an important impact on the spread of the jury trial in Europe which was promoted by liberal movements who saw in it an offset to the judge as the king's official and a guarantee of the independence of the courts from the influence of the governments. After introduction of the juries, the debate began about their *ratio* and limitations, where the German doctrine and legislation played important role.<sup>1</sup>

## **2. Jury trial in Croatia and Slavonia (1848–1918)**

In the time of revolutionary events of 1848 Croatia was territorially and politically divided. The Kingdom used the formal title of the Triune Kingdom of Croatia, Slavonia and Dalmatia, but Dalmatia and Istria were Austrian crownlands. Demands for the abolition of censorship and the introduction of trials by jury, especially for publishing offences, were expressed in The Demands of the People from 1848, a petition which presented the symbolic fundament for the further political activities of the Croatian national forces. However, none of these demands was reflected in the legislative work of the one-month session of the Sabor in 1848. Though, the proclamation of the freedom of the press and the abolition of censorship led to the enactment of special laws concerning the press.<sup>2</sup>

The first Croatian Act on the jury trial was "The Provisional Law on the Printed Matters" which was decreed by the Ban Josip Jelačić in May 1849. Juries were used in

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<sup>1</sup> FORSYTH, William: History of Trial by Jury, James Cockcroft & Company, New York, 1875, pp. 295–312, 325–330.

<sup>2</sup> ČEPULO, Dalibor: The press and jury trial legislation of the Croatian Diet 1875–1907: Liberalism, fear of democracy and Croatian autonomy. *Parliaments, Estates and Representation*, 2002/1, p. 176.

criminal procedure related to publishing offences. They consisted of the citizens of the respective town and were formed by the town's mayor, at the request of the public prosecutor, by convening a panel of 36 persons. In the jury selection process, the public prosecutor and the defendant were allowed to exclude up to twelve candidates, so that finally a jury of twelve was chosen. The requirements fitting individuals for jury service were not defined. Although the principle of orality in combination with the principle of publicity were expected, actual procedure was not well regulated. There was only one jury trial held on the basis of this Law on February 6, 1850, which ended in scandal as one of the jurors, a retired judge, left the trial in protest against the unconstitutionality of the decreed Law. After that, Ban Jelačić issued a regulation abolishing juries.<sup>3</sup>

The introduction of absolutism made the situation even worse, since the Sylvester Patent of 1851 explicitly prohibited trial by jury. But, after the return of constitutionality in 1860, the Sabor attempted to regulate the position of the press and criminal procedure on two occasions, in 1861 and 1865. After the dissolution of the Sabor in 1867, the king did not approve any of the laws proposed. Another unsuccessful attempt to regulate position of the press and jury trial followed the Croatian–Hungarian Compromise in 1868. The Croatian autonomous government prepared draft laws on the press and jury trial and submitted them *via* central government to the king for the pre-sanction. On this occasion, the central government declared its opposition to these proposals, claiming that they have had bad experiences with the Hungarian press and trials by jury. Finally, ban Levin Rauch dropped the proposal, although his government promised Sabor's delegates that the press law would soon come in debate. In general, the regulation of the press and jury trials was an issue, which was not resolved in Croatia until political turbulence slowed down and a new political constellation appeared on the scene.<sup>4</sup>

## **2.1. Jury trial in the period 1875–1884**

The 1870s were marked by ban Ivan Mažuranić, who promulgated numerous legislative and judicial reforms and modernized the Croatian state. However, the regulation of the

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<sup>3</sup> ČEPULO, Dalibor: Trial by Jury in Croatia 1849–1918: Transfer and the Context, In: Rechtsprechung in Osteuropa. Studien zum 19. und frühen 20. Jahrhundert, Vittorio Klostermann, Frankfurt am Main, 2012, pp. 19–22.

<sup>4</sup> *Ibid.*, pp. 23–27.

press and reform of the criminal justice system, at least in the area of introducing jury trials, did not happen until 1874. The governmental proposals had been made according to Austrian models. The most important difference concerned the jurisdiction of a jury. While in Austria trial by jury was a part of general criminal procedure regulations, and covered rather wide scope, in Croatian legal system it was limited exclusively to procedure involving press offences. Croatian government explained that modern legislations accepted broader competence of juries but that this solution wasn't suitable in Croatia and Slavonia for objective reasons.<sup>5</sup> The trial by jury in Croatia and Slavonia was introduced and regulated by two *leges speciales*, The Law on Criminal Procedure in Printed Matters of 1875 and The Law on establishing a List of Jurors of the same year. Only one jury court was established at the county court in Zagreb with territorial jurisdiction for the whole of Croatia and Slavonia. The court consisted of the senate and the jury. The jury decided on guilt and on mitigating and aggravating circumstances that affected the degree or type of punishment. However, the basic act of criminal procedure reform and a subsidiary source of laws regulating jury trial was the Criminal Procedure Code of 1875.<sup>6</sup>

Prerequisites for jurors were that a candidate is male, aged between 30 and 60, can read and write, domicile for at least one year in Zagreb, payer of at least 20 florins of tax, or (alternatively) 24 years of age and with intellectual achievements (a university degree or high technical education or an academician), or with professional qualifications (lawyers or notaries, professors). Certain state and church professions were excluded from jury service, as well as individuals with physical, mental or legal limitations. The procedure of compiling a jury panel began by compiling a preliminary list of names of eligible persons. It was drawn up by the mayor and posted in public for eight days. After that, the annual list was formed. Fourteen days before a jury began to meet, 36 main jurors and 9 deputy jurors were selected by drawing lots at a public session of the jury court, in the presence of the public prosecutor and one other lawyer.<sup>7</sup>

The enactment of new press and jury laws provided a favourable basis for the advancement of the press and the development of the political parties and the Croatian political scene. In practise, the limitations imposed on administrative reprimand and the

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<sup>5</sup> *Ibid.*, pp. 27–32.

<sup>6</sup> ČEPULO 2002, *op. cit.*, pp. 182–183.

<sup>7</sup> *Ibid.*, pp. 183–184.

introduction of juries formed a solid defence against more drastic state intervention. For this reason, the government (the public prosecutor) tended to avoid jury trial when reacting to the press.<sup>8</sup>

## **2.2. Jury trial in the period 1884–1918**

In 1883, a Hungarian aristocrat from Slavonia, Károly Khuen-Héderváry became ban and was given the task of securing Hungarian interests and keeping Croatia and Slavonia subservient. By the law of December 2, 1884, jury trial was suspended for three years. The government justified the suspension by referring to the repeated failures of the public prosecutor's office, in spite of the fact that it had only initiated procedure before a jury in cases which were undeniable. This suspension of juries was then extended in December 1887 for further two years. The spokesman for the Sabor's committee justified the extension by claiming that the situation has not changed in any specific way that juries were not a precondition for freedom of the press and that juries judging crimes of a political nature were themselves more a political, than legal institution.<sup>9</sup>

In 1897, the Law on Criminal Procedure in printed Matters of 1875 was amended. This amendment was the government's reaction to bitter polemics in the Croatian and the Serbian press that evolved into attacks of the Croatian press on the Croatian–Hungarian Compromise. Jurisdiction of the jury was restrained, i.e. private prosecutions were exempted from the competence of juries and sent to county courts. Jury trial was suspended once again in 1903. The same year there was a significant change in the political context, which brought in moderate re-liberalization of the press and jury trial legislation. In 1903 Khuen-Héderváry left the Croatian political scene, and in 1905 the Croatian–Serbian Coalition won the elections for Sabor on the programme of moderate liberal and democratic reforms.<sup>10</sup>

One of the first important measures taken by new government was the lifting of the suspension of jury trial in January 1907. It was explained by stability within the political environment. The new government expressed a positive attitude towards juries. In 1907 the government undertook a small set of reforms of the outdated press and jury trial

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<sup>8</sup> ČEPULO 2012, *op. cit.*, p. 38.

<sup>9</sup> *Ibid.*, pp. 47–50.

<sup>10</sup> *Ibid.*, pp. 52–56.

legislation. Regarding the jury trial, there was a marked broadening of the competence of jury courts. Also, another jury court was formed in Osijek, and the government was authorised to delegate jury competence to another jury court in cases prescribed by law. Overall, that re-liberalisation of press and jury legislation in 1906 and 1907 represent a significant improvement in the situation, which opened up the perspective of further development. However, actual conditions were not in favour of that. Ultimately, political crises and outbreak of the World War I have led to new restrictions.<sup>11</sup>

### **3. Jury trial in Dalmatia and Istria 1848–1918**

As already mentioned, Dalmatia and Istria were Austrian crown lands, and they were part of Austrian legal system. Their legal development therefore came about separately and in a different manner than in Croatia and Slavonia. In Austrian lands, among the major demands of the liberal movement in 1848 were also demands for freedom of the press and trial by jury. The proclamation of the freedom of the press and the abolition of censorship led to enactment of special laws on press. In such context reforms to criminal procedure were initially introduced only with regard to press offences. Press laws enacted in Austrian part of Monarchy were the Provisional Press Laws of May 1848, which were replaced by the Press Laws of March 1849. By means of these laws accusatory principle was introduced to criminal procedure for press offences, as well as the oral and public hearing and jury. Introduction of these Press laws in Istria and Dalmatia had no considerable practical significance due to the short time of their validity and the journalism which was undeveloped.<sup>12</sup>

In March 1849 Franz Joseph proclaimed a centralistic constitution for the entire Monarchy. That constitution accepted the acquisitions of the liberal movement of 1848 among which was a jury trial in cases of political and press offences and serious crimes. In accordance with principles of that constitution, the new Criminal Procedure Code was drafted and adopted in 1850. It was introduced in Austrian lands, with some exceptions. Dalmatia was exempted from its introduction while the procedure governed by the Criminal Code on Crimes and grave Police Contraventions of 1803 remained in force.

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<sup>11</sup> *Ibid.*, pp. 98–102.

<sup>12</sup> PASTOVIĆ, Dunja: Sloboda tiska i porotna sudbenost u Istri 1848./1849 [Freedom of press and jury trial in Istria 1848/1849], Zbornik Pravnog fakulteta u Rijeci, vol. 36, no. 2, 2015, pp. 725–756.

Possible reasons why the introduction of the jury in Dalmatia was postponed were low level of population education and still present practise of blood revenge. With reference to Istria, from February until December 1851 there were 11 criminal cases heard before the single existing jury court in Rovigno. Despite some evident advantages of the Criminal Procedure Code of 1850, reactionary tendencies for its abolition emerged in short period of time for alleged immaturity of the nation. In 1851 it was subjected to a revision with the purpose of drafting the Criminal Procedure Code that would also apply to the countries of the Hungarian Crown. The constitutional order introduced by the March Constitution was abolished by means of the Sylvester Patent from December 31, 1851, by which a new absolutism was introduced. The jury and public trials were abandoned.<sup>13</sup>

The liberal movement and the constitutional reforms which followed 1860 and 1861 attracted attention to the defects of the criminal procedure. Numerous plans for the reform of criminal procedure were successively studied. The Criminal Procedure Code of 1853 remained in force in Austrian lands until January 1, 1874, when the new Criminal procedure code of 1873 was introduced. In many respects, criminal procedure returned back to the codification of 1850. Its fundamental principles had been already fixed by the December Constitution of 1867, that is, the oral nature and publicity of the trial, the accusatory trial and the jury for the more serious offences, political offences, and those of the press. The jurisdiction of the juries was limited to certain classes of offences. A procedure as formal, elaborate, and expensive as the jury trial should be reserved for serious offences for which a severe imprisonment over 5 years was prescribed, political and press offences. At first, the jury began to act for press offences only under the special Law on criminal procedure in press matters of March 9, 1869. Juries, who decided in criminal cases of press offences (which usually contained attacks against the government and persons in authority), were often the subject of public criticism and were accused of acting more political than civic bodies, because they usually acquitted defendants. This special law was put out of force by introducing Criminal Procedure Code of 1873.

The Criminal Procedure Code of 1873 has received the unanimous approbation of the scholars in criminal law. It was inspired, no doubt, by the French Code of Criminal

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<sup>13</sup> PASTOVIĆ, Dunja: Porotno suđenje u Istri prema Zakonu o kaznenom postupku iz 1850., [Jury adjudication in Istria according to the Criminal Procedure Act of 1850], *Hrvatski ljetopis za kazneno pravo i praksu*, vol. 20, no. 1, 2013, pp. 203–262.

Examination, but it was very much modified and improved. The Code of 1873 had a great influence upon the contemporary regulation of criminal procedure. Criminal procedure was built upon the accusatorial principle, oral and public procedure, unrestricted evaluation of evidence and upon a trial by jury for most serious crimes against the state and against the person. When a trial by jury was ordered, jurors were to decide the issue of guilt, while the panel of three professional judges decided on issue of law, i.e. they imposed a relevant penalty. In the period from 1874 until 1918 there were a total of five jury courts in Istria and Dalmatia: one in Istria (Rovinj) and four in Dalmatia (Zadar, Split, Dubrovnik and Kotor).<sup>14</sup>

#### **4. Conclusion**

Jury trial was initially introduced in Croatian lands in 1848/1849 only for press offenses, in the framework of aspirations for freedom of thought and expression through the press, which represented the most appropriate medium for the dissemination of new ideas and mobilization of the political masses. The legislative politics in jury trial matter substantially depended on political context. When the Constitution of 1849 was abolished in 1851 absolutism openly decreed abolition of juries. Since then juries have always been an object of struggle between democracy and absolutism, and the existence or non-existence of jury courts has been, so to speak, the thermometer of constitutional government. Austrian legislation on the jury had a decisive influence on the development and application of this institute in Croatian legal system. But, when the World War I began, all potential of development of jury trials was cut off and all forms of lay trials were extinguished in the new Yugoslav state. In general, study of transfer and functioning of the jury trial in Croatian legal system shows one very complex view of the institute and the environment itself.

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<sup>14</sup> PASTOVIĆ, Dunja: Normativni okvir porotnog suđenja u Istri u razdoblju od 1873. do 1918. [The legislative framework for jury trial in Istria in the period from 1873 to 1918], *Pravni vjesnik*, vol. 31, no. 2, 2015, pp. 77–108.



# **Anna GERA: The Position of Women in the Hungarian Criminal Justice System and the Women's Penitentiary in Márianosztra in the 19<sup>th</sup> and 20<sup>th</sup> Century**

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## **1. Introduction**

The Márianosztra Strict and Medium Regime Prison, celebrating the 160<sup>th</sup> anniversary of its foundation this year, is one of the oldest buildings still in operation as a prison in Hungary. From the day of its opening ceremony on 17 October 1858<sup>1</sup> to 1950, when the State Prosecution Authority<sup>2</sup> took control over the building to use it as a prison for political criminals of both genders,<sup>3</sup> the Márianosztra penitentiary was Hungary's only separate female facility housing women guilty of committing violent crimes against property, life or physical integrity.

Although the traditional concept of prisons indicated that the most important or even only single aim of incarceration was to separate the most dangerous criminals from the rest of the society, this approach had been revised by the time of the 19<sup>th</sup> century. Getting to know to the liberal Western European ideas that promoted the importance of mental, moral and social education of the inmates in order to facilitate their reintegration,<sup>4</sup> the Hungarian prisons, including the Márianosztra penitentiary, started to place emphasis on helping individual change.

In accordance with this principle, besides the four male guards securing the building outside, the inmates were placed under the custody of the sisters of the Hungarian Order of Saint Vincent.<sup>5</sup> Although the nuns primarily focused on the prisoners' spiritual mentoring, they were also responsible for several other tasks since the operation

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<sup>1</sup> TASNÁDY, György: A börtön és története [The prison and its history] in: „Nostra” – A 140 éves Márianosztrai Fegyház és Börtön Jubileumi Évkönyve [„Nostra” – The anniversary yearbook of the 140 years old Márianosztra Strict and Medium Regime Prison], Márianosztra, 1998, Márianosztrai Fegyház és Börtön, p. 61.

<sup>2</sup> The secret police of Hungary from 1945 to 1956

<sup>3</sup> About this and the following period, see more in: TASNÁDY, *op. cit.*, pp. 63–68.

<sup>4</sup> TAMÁSKA, Péter: Márianosztrai panoptikum [Márianosztra panopticon]. Budapest, 1988, Pallas Lap- és Könyvkiadó Vállalat, p. 17.

<sup>5</sup> Alapítva: 140 éve – Márianosztra tegnap és ma [Founded: 140 years ago – Márianosztra yesterday and today], *Börtönügyi Szemle*, 1998/3, p. 123.

of the penitentiary was solely entrusted to them by the Ministry of Interior of the Empire. They provided the prisoners the opportunity of learning and working, they administered their nutrition and healthcare and also took care of women having young children or expecting a baby.

Even though for this century the penitentiary could only be visited with an official authorisation,<sup>6</sup> several people, including authors, journalists, judges and members of the Parliament came to Márianosztra to examine the conditions of the prison and have some word with the inmates. By reading their reports, we get the chance to learn about female criminality and the position of women in the criminal justice system around the times of the turn of the century.

## **2. Hungarian female criminality in the 19<sup>th</sup> and 20<sup>th</sup> century**

The Hungarian Reform Era brought significant changes to the country's legal system: the reformer politicians worked for, among many other aims, creating equality before the law, and their efforts resulted in the adoption of the April Laws in March 1848 (later followed by the Austro–Hungarian Compromise in 1867 and the Croatian–Hungarian Compromise in 1868)<sup>7</sup> declaring liberties and equal rights.<sup>8</sup> However, these regulations were not sufficiently inclusive for women: alongside numerous other shortcomings (concerning for example the right to vote and the right for education), women's criminal perception and the treatment of their actions under the criminal law was one of the disparities that made Lajos Báttaszéki, the era's great jurist, stand up for women in 1871, saying that „we should – at least before the law – already be equal in our days”.<sup>9</sup>

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<sup>6</sup> Sándor Résző Ensel talks about the „illustrious Royal Locotenential Council”, see: Résző Ensel Sándor: Három országos női fegyház [Three national penitentiaries for women], 1887, p. 33.: [http://mtdaportal.extra.hu/books/három\\_országos\\_noi\\_fegyhaz.pdf](http://mtdaportal.extra.hu/books/három_országos_noi_fegyhaz.pdf) [Access March 17, 2018]. Later, in 1889, the Hungarian novelist Mór Jókai writes about a ministerial order in his novel titled *A tengerszemű hölgy* [The lady with ocean-like eyes] (1889).

<sup>7</sup> GOSZTONYI, Gergely: Croatia-Slavonia's situation after the reconciliations, *Cahiers poitevins d'Histoire du Droit - Septième Cahiers*, Tome 7, 2016, pp. 129–135.

<sup>8</sup> GOSZTONYI, Gergely: Szabadságjogok [Fundamental freedoms]. In: KÉPES György (ed.): *A hatalommegosztás államszervezete, 1848–1949. Magyar alkotmány- és közigazgatástörténet a polgári korban* [The state structure of separation of powers, 1848–1949. History of Hungarian constitution and public administration]. Budapest, 2013, ELTE Eötvös Kiadó, pp. 217–232.

<sup>9</sup> BÁTASZÉKI, Lajos: A nők a magyar jogban [Women in the Hungarian legal system], *Fővárosi Lapok*, 1871/7, p. 176.

The most prominent example of gender disparities in the 19<sup>th</sup> century might have been the perception of adultery: if a husband caught his wife being an adulteress, he was legally allowed to kill her in that very moment, however, in the converse situation, the wife did not have the same right.<sup>10</sup> There was also a significant difference between the sexes when it came to executing capital punishment: men were put to death by hanging and women were beheaded by sword.<sup>11</sup> The reason of this differentiation was rather practical: hanging women was considered to be contrary to morality and modesty throughout the history since that would enable the crowd watching the execution to see under the skirt of the convict.<sup>12</sup>

Against this background, the constitutional and legal revolution of the 19<sup>th</sup> century brought wide-ranging changes to the criminal justice system that equally concerned men and women. As a response to the increasing criminality after the 1848 Revolution and the ensuing Hungarian War of Independence, the neo-absolutist government decided to build new prisons. This step was bound up with the fact that the most common forms of medieval punishment (especially death penalty and physical punishment) were relegated and in most cases replaced by custodial sentence aiming to enable the lawbreakers' reintegration to society.

Before the Compromise, nine facilities were built in the Empire, and by the year of 1871, there were three penitentiaries operating on Hungarian territory solely to house women: in Nagyenyed (Transylvania, Romania), Zagreb (Croatia) and Márianosztra (this one still lies within the territory of Hungary).<sup>13</sup> A survey carried out in the second half of the 19<sup>th</sup> century shows that on average 35.393 people were convicted every year in the Monarchy, less than the half of them, 15.618 people were Hungarian and 1.874 of them were women (12% of all of the Hungarians convicted). On the other hand, 18% of the 19.795 remaining Austrian prisoners were women (3.563 people, almost double the

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<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> In Germany, in the 17<sup>th</sup> century, this problem was solved by making the convicted women wear pants under their skirts. About this see more in: VINCZE, Eszter: A nőekkel szemben alkalmazott büntetések a középkorban és az újkorban [Punishments against women in the middle and modern ages], *Börtönügyi Szemle*, 2012/1, p. 102.

<sup>13</sup> BÁTTASZÉKI, *op. cit.*

number of Hungarian female inmates) – Lajos Báttaszéki believed that „this comparison undoubtedly testifies the moral high ground of Hungarian women”.<sup>14</sup>

The Márianosztra penitentiary, which was transformed to prison from a monastery and was able to accommodate six hundred inmates, housed on average three or four hundred women a year, women that were described by journalist Márton Zöldi as: „major evildoers, those who killed, murdered or committed serious crimes against property. The less serious offenders are in detention houses and jails, while in Mária-Nosztra, we can see the heroines of bloody family dramas, women, whose vicious instincts made them commit great crimes”.<sup>15</sup>

Alongside the one or two extortionists, forgers, frauds and women who inflicted grievous bodily harm with intent, the majority of Márianosztra's inmates were indeed female criminals guilty of committing crimes against life or property: in 1866, from the total of 388 prisoners, 141 were serving for infanticide, 109 for larceny and 67 for murder.<sup>16</sup> After the turn of the century, the statistics showed a change: there was a decrease in the proportion of women committing infanticide and abandonment of children (57 people of the 370 inmates) and murder as well (10 people), while 85 women were sent to Márianosztra for abortion and 187 for negligent manslaughter.<sup>17</sup>

By the 1920s, the definition of crime has also changed.<sup>18</sup> Concomitantly, the first political criminals appeared in Márianosztra: spies, partisans, foreigners and other women perceived to be dangerous for the leaders of the country, including Rózsi Csillag and Gizi Weis who were found guilty of planning the assassination of Regent Miklós Horthy. After 1945, the composition of the prison population changed once more; it housed "supporters of the radicals, informers, actresses, wives of bankers and gold smugglers"<sup>19</sup> until 1950, when the building was converted to keep political criminals, and the female prisoners were first transported to Sátoraljaújhely then Kalocsa, marking the end of a nearly 100-year-long era in the history of the Márianosztra prison.<sup>20</sup>

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<sup>14</sup> *Ibid.*

<sup>15</sup> ZÖLDI, Márton: Mária-Nosztra, *Tolnai Világlapja*, 1906/4, p. 147.

<sup>16</sup> TAMÁSKA, *op. cit.*, p. 22.

<sup>17</sup> *Ibid.*, p. 34.

<sup>18</sup> TASNÁDY, *op. cit.*, p. 61.

<sup>19</sup> *Ibid.*, p. 59.

<sup>20</sup> This event did not mean the closing of the prison: in the following decades, numerous prisoners served here the sentences handed down on them for political reasons, including Árpád Göncz, who later became

### 3. Life behind prison walls

As have been mentioned before, in the 19<sup>th</sup> and 20<sup>th</sup> century the primary role of prisons, as laid down in a decree by the Austrian Ministry of Justice in 1854<sup>21</sup>, was to prepare the inmates for a successful return to society. Since education and spiritual mentoring was seen as one of the most effective means of facilitating the rehabilitation of the inmates, the Austrian government could turn to the Hungarian Order of Saint Vincent with trust: the sisters had been taking care of prisoners and the sick since the formation of the order in the 16<sup>th</sup> century, and they also assured the Austrian government of their loyalty in 1849 when they decided to oppose the Hungarian Revolution and War of Independence.<sup>22</sup>

The sisters' work evoked mixed reactions among the general public. Lajos Révai, in his study on the comparison of the Croatian and Hungarian criminal justice system, writes the following: „In Mária-nosztra and Zagreb, nuns are entrusted to run the penitentiary (...) Neither in our county, nor in Zagreb is the public satisfied with this administration, but that cannot be helped for now. They believe the enforcement of the sentences to be too gentle.”<sup>23</sup>

Controversially, Sándor Réső Ensel, who visited all female penitentiaries in the Austro–Hungarian Monarchy, draws a much more positive picture of the sisters' work: „I firmly believe that all sceptics and realists have to admit that these nuns have a huge and invaluable impact on the inmates: listening to the conversations of our guides, I saw how they ennoble the soul, awaken and develop mindfulness and intellect: their penitentiary is truly an educational institution.”<sup>24</sup>

#### 3.1. Teaching and spiritual mentoring

One of the roots of these conflicting opinions might have been the fact that it was rather controversial in public eye whether the spiritual education, which formed the basis of the sisters' work, had a beneficial influence on inmates, and if so, whether it was enough. Yet it

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the President of Hungary. About this era, especially the situation of the political prisoners, see: DÓCZI, István: Adalékok a Márianosztrai Fegyház és Börtön történetéhez [Further information about the history of the Márianosztra Strict and Medium Regime Prison], *Börtönügyi Szemle*, 1991/4, pp. 44–50.

<sup>21</sup> The decree was issued by the Austrian Ministry of Justice in 16<sup>th</sup> of June, 1854.

<sup>22</sup> TASNÁDY, *op. cit.*, p. 18.

<sup>23</sup> RÉVAI, Lajos: A progresszív büntetésvégrehajtás Magyarország-, Horvátország- és Boszniában [The progressive law enforcement in Hungary, Croatia and Bosnia], *A jog*, 1904/15, p. 117.

<sup>24</sup> RÉSŐ ENSEL *op. cit.*, p. 33.

was natural – partly because of the superintendents' religious beliefs, partly as a consequence of the penitentiary's history as a monastery – that the prisoners received Christian mentoring: the walls of the prison were decorated with Bible passages, the inmates prayed twice a day, listened to stories about the saints' lives during meals and spent their free time often in the chapel of the facility.

The penitentiary evidently focused on Catholic preaching, and since according to the Catholic interpretation of the Bible the prisoners were guilty not only in a legal but also in a spiritual sense, the sisters attached much importance to the confession of the sins. Besides, there were masses held for both Roman and Greek Catholics every day on which attendance was obligatory unless the particular prisoner belonged to another religion. Initially, it was the pastor of Nagymaros who visited the facility once a month and took responsibility for the pastoral care of the Protestants (he also took care about the Hebrew inmates, „since the spirit of Protestantism was closer to the Old Testament than Catholicism”<sup>25</sup>). Later, the Protestants had been given the opportunity of visiting church service every day, and they also received religious and moral education ten hours a week.<sup>26</sup>

Besides the spiritual mentoring, the prisoners were also taught in a more secular context. The inmates had to attend school until they reached the age of thirty: they learned to write, read, sew and embroider, and the nuns also gave them singing lessons and divinity classes. Moreover, the prisoners had to take exams every year to prove the improvement of their skills and knowledge. The lessons were given in both Hungarian and German (because the women did not speak all the same language) – partly due to the fact that this required more effort, partly because of the obligatory prison labour, they were given twice a week and each of them lasted two hours.

Besides teaching, the sisters also offered various books for the inmates that the prisoners willingly read in their free time. However, Sándor Résző Ensel, who was a great advocate of creating prison libraries, had a critical opinion on these: "We found that these

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<sup>25</sup> TAMÁSKA, *op. cit.*, p. 25.

<sup>26</sup> A Dunáninneni Ág. Hitv. Evang. Keresztény Egyház-kerület 1918. évi augusztus 21. és 22-én Pozsonyban tartott rendes közgyűlésének jegyzőkönyve [The minutes of the Protestant Christian diocese's regular assembly in Pozsony, on the 21<sup>st</sup> and 22<sup>nd</sup> of August, 1918.], Pozsony, 1918, Grafikai Műintézet Wigand K. F., p. 72.

books mostly give lessons on sacred topics, while fine tales providing moral lessons would delight the heart of these women."<sup>27</sup>

### 3.2. Prison Labour

Alongside the spiritual training, the life of the prisoners mostly consisted of labour (in most cases, education was also made subordinate to it). The general rules of prison labour were firstly enshrined in the previously mentioned decree of the Austrian Ministry of Justice in 1854 – according to this, the convicts could only work inside the facility. This ruling was later followed by several others and finally, in 1874, the Minister's of Justice new order<sup>28</sup> authorised the superintendents to order work outside the prison.

Against this background, the women of Márianosztra did not do any work outside the penitentiary until the beginning of the 20<sup>th</sup> century. Instead, the prisoners made embroideries, crochets and knitworks for the ones who ordered, and they also had the chance to display these works. The *Bulletin of Békésmegye* even credits their handicrafts in 1885, writing the following in an article: „It is truly surprising to see the diversity, relative perfection and external beauty of the crafts that visitors encounter in this hall, and although we feel pity for those who have fallen, we are still satisfied realising that our prisons are not places for slothfulness anymore but facilities where large numbers of convicts receive true education."<sup>29</sup>

1903 brought change to the prison labour in Márianosztra, when Eugénia Wagner, the penitentiary's new governor, in accordance with the modern principles of prison management, wanted to further emphasise the therapeutic purpose of this labour: since working in the fresh air could contribute to reducing the monotony of prison life and the feeling of isolation, prison labour became the means of keeping inmates both physically

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<sup>27</sup> RÉSŐ ENSEL, *op. cit.*, p. 27.

<sup>28</sup> This was the Order No. 696/1874 of the Minister of Justice issued on the 18<sup>th</sup> of February, 1874. Before this, there were two others worth mentioning: the Order No. 20172/1863 of the Royal Locotenential Council that confirmed the order of the Minister; and another order of the Minister of Justice issued on the 10<sup>th</sup> of February, 1869., prescribing that a doctor shall be present when the superintendents decide the type of labour the prisoner has to do. For further information about this, see: SOMOGYI, Ferenc: Egy rendelet hatása a börtön életére [A decree's effect on the life of the prison], in: „Nostra” – A 140 éves Márianosztrai Fegyház és Börtön Jubileumi Évkönyve, 1998, pp. 50–58.

<sup>29</sup> A fegyencz- és rabmunka az orsz. kiállításon [Crafts of prisoners and convicts in the national exhibition], *Békésmegyei Közlöny*, 1885/41, p. 1..

and mentally healthy. Because of this, and also as a consequence of the facility's extension in the 1890s that resulted in an increase of the number of prisoners the penitentiary could house, the Ministry of Justice bought the lands that were rented before and created a self-sustaining farm around the prison. Subsequently, the prisoners worked on the fields on a daily basis, and, except for the few coachmen providing transport services, they did it without any help of men.

Although it was not easy to perform agricultural tasks, since the majority of the inmates did similar work before they were sentenced, the penitentiary soon became capable of maintaining subsistence farming. The women dealt with the basic tasks of plant production including planting seeds, ploughing and harvesting wheat, barley, rye and corn, and they were also responsible for animal care having their own dairy and poultry farms, moreover, apiaries. Inmates also liked gardening: alongside floriculture and market-gardening, they took care of the orchard and the vineyard as well, which gave them the opportunity to learn about the basics of winemaking.<sup>30</sup>

Although the women earned some money with their work, the prison labour's primary goal was not to provide financial support for the convicts.<sup>31</sup> It had actually two main functions instead: on one hand, the costs related to the operation of the prison could be at least partially reimbursed by selling the surplus products, and on the other hand, the daily work kept prisoners busy in productive activities, in this way contributing to the maintenance of their physical and mental health.

### **3.3. Living conditions**

Besides working in the fresh air, nutrition also formed an important part of leading a reasonably healthy lifestyle behind the bars. The prisoners normally had three meals a day, however, women doing hard work on the fields received two extra food rations. In his work, Sándor Réső Ensel gives us a general overview of the meals prepared in the prison kitchen (also by the inmates): the women got a soup and a main course for lunch every

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<sup>30</sup> About this see more: MOÓR, József: A Márianosztrai Fegyház és Börtön [The Márianosztra Strict and Medium Regime Prison], in: „Nostra” – A 140 éves Márianosztrai Fegyház és Börtön Jubileumi Évkönyve, 1998., p. 10.

<sup>31</sup> An interesting comparison to prove this statement: at the end of the 19<sup>th</sup> century, prisoners earned the 1–3% of the average annual income of a working man in Ganz's factory. TAMÁSKA, *op. cit.*, p. 26.



day, and one of the dishes was made from meat four times a week.<sup>32</sup> As a result of the sisters' special request towards the Ministry of Interior, the inmates were also able to eat fruits regularly.<sup>33</sup>

The prisoners had to wear a special prison uniform instead of their own individual civilian clothes in order to make them identifiable and also to emphasise the difference between them and the prison officers. Each woman was given a blue dress with white stripes, a blue apron, a white petticoat and a pair of white tights. In summer, they wore a white bonnet made of linen, while in winter they got a crocheted black bonnet and also a knitted jacket. Their shoes were made of leather since that was durable enough to wear it for prison work on a daily basis.

As for sanitary facilities, separate latrines and washbasins were available in order to guarantee the prisoners' personal hygiene and to avoid the transmission of certain infectious diseases. Despite this, it was not until the end of the 19<sup>th</sup> century when showering appeared as part of a regular personal routine of the inmates, and still, prisoners not working on the fields could only bath three times a year. In the course of time, bathing eventually became part of the women's daily route, furthermore, following a medical advice, a bathing pool was also built in the prison yard.

It was also advised by the prison doctor to avoid using handcuffs in the penitentiary after realising that wounds caused by the heavy chains can easily lead to infections. Not only this made the prisoners' lives easier but also did the fact that the superintendents were reluctant to order the use of physical punishment: instead, they typically sent the disruptive prisoners to solitary or darkroom for a brief time, which was a significantly less torturing experience.

### **3.4. Healthcare conditions**

Since the penitentiary operated far away from populated areas, it was necessary for the superintendents to employ a prison doctor. With the help of the nuns and inmates, he was responsible for curing ill women and performing minor surgical procedures, and he also conducted deliveries and gave immediate newborn care when a child was born behind the

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<sup>32</sup> RÉSZ ENSEL, *op. cit.*, pp. 29–30.

<sup>33</sup> Márianosztra was the only penitentiary in the country to have this privilege.

prison bars. Journalist Zsigmond Falk's report provides a general overview of the prison's healthcare conditions: „Diseased women are completely separated from the other inmates. A hospital operates for them inside the penitentiary in which there is a separate kitchen and washhouse. Medical care is provided by the healthy prisoners under the supervision of the nuns, following a doctor's advices (...) The hospital has its own pharmacy; the medicinal herbs are grown in a special herbal garden.”<sup>34</sup> Patients were also given different nourishment: gruel in the morning, vegetable dish, stew and fruits for lunch, white bread roll instead of bread and even wine, if it was ordered by the doctor.

However, although the nuns endeavoured to reduce the number of occupational illnesses, the living conditions in the prison were not sufficient enough to preserve the health of the inmates. Women in the penitentiary suffered the consequences of malnutrition, the decline of physical activities and the lack of proper ventilation in the prison rooms, leading to severe diseases and even death. Moreover, epidemics also occurred regularly, and as a result, the health statistics painted a worrying picture: in the second half of the 19<sup>th</sup> century, the mortality rate in the prison was 13%, and afterwards, during the following decades, cholera, typhoid fever and tuberculosis took their victims as well as scurvy, which was back then incorrectly considered to be an epidemic disease as well.<sup>35</sup>

#### **4. The situation of prisoners expecting a baby or having young children**

Since birth control was in its infancy during the 19<sup>th</sup> and 20<sup>th</sup> century, it was not unusual that a pregnant woman gave birth to her infant behind the bars or even before the delivery of final judgement. As the criminal justice system of the era was less developed, it was often incredibly sorrowful for these mothers to get to Márianosztra, putting even the child's life at risk. Among many others, Rezső Rupert, member of the Hungarian National Assembly believed this situation to be intolerable and addressed an interpellation in 1922 to the Minister of Interior.

„Just be so kind to imagine that these little darlings are very often born in pre-trial custody; in many cases, the mother is forced to stay there with her small baby. To take

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<sup>34</sup> FALK, Zsigmond: Márianosztra, *Ország-Világ*, 1925/31, p. 42.

<sup>35</sup> See more in.: TAMÁSKA, *op. cit.*, pp. 27–28.

Budapest as an example, first, these women are collected in a container and then are brought to the Markó street. In these cases, the prescribed diet plan evidently cannot always be followed since these shifts usually last for only a couple of hours. Afterwards, they are taken to Márianosztra, which is a long journey by train, and after that, they have to walk many kilometres with their small little infants. Just be so kind to imagine all the ways these newborns suffer! As the doctors say, they stand no chance against »hypothermia«, they get gastritis or enteritis and die. You only have to look at the statistics of the prisons: the number of child deaths is dreadful”<sup>36</sup> – argued in his speech. The minister, however, requested more time to prepare his answer, and the questions of the agrarian reform and the internment turned out to be more urgent and eventually diverted attention away from this problem.

Children born in prison were in a relatively more favourable position as the superintendents made it possible for their mothers to take care of them ensuring their healthy development in the beginning of their life. The first two legislations on this subject stated that the mother should not be separated from her newborn as long as the child needs breastfeeding<sup>37</sup>, and the inmates with children were also given less work and more nourishment if they needed. In the 19<sup>th</sup> century, Sándor Résző Ensel writes about a separated room equipped with cradles, and also mentions "older kids" living in the penitentiary indicating that they were able to learn to walk<sup>38</sup> before they had to leave their mother to be given to a family member or taken into authority care.<sup>39</sup>

## 5. Rehabilitation

Since the primary aim of the Márianosztra penitentiary was to prepare inmates for reintegration, the convicts could get, at least in the 19<sup>th</sup> century, early release if they maintained good behaviour while they were imprisoned. If they earned some money doing prison labour, they received a book of eight pages in which the superintendents listed the things they brought to prison and the things they obtained later. Moreover,

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<sup>36</sup> Nemzetgyűlési napló 1920–1922[Journal of the National Assembly 1920–1922], Session 206, 10 June 1921

<sup>37</sup> Order No. 696/1874 of the Minister of Justice;; Order No. 2106/1880 of the Minister of Justice

<sup>38</sup> RÉSŐ ENSEL, *op. cit.*, p. 28.

<sup>39</sup> Nowadays in Hungary a mother can spend a year with her child according to the Act CCXL of 2013 on the Execution of Punishments, Criminal Measures, Certain Coercive Measures and Confinement for Administrative Offences, Article 128 para. 2.

„women living in poor conditions were provided some financial support“<sup>40</sup> after their release.

However, the rate of release was low during the decades. In his article Zsigmond Falk argues that the reason of this was that no matter how hard the sisters were trying to make the imprisoned women forget the loss of their liberty, „this is so indelibly stamped upon their heart that, according to the governor, only two prisoners were released among those who were sentenced to fifteen year of imprisonment; the rest passed away mentally broken and thereby physically weakened to the distant, better world where there is equality between all of us“.<sup>41</sup> Others seek to explore another angle trying to explain the high rate of released prisoners returning to Márianosztra. Márton Zöldi saw the answer of this question in the fact that there is so much darkness in some women and therefore they will never be able to leave the path of sin. „Never have I ever seen a smile more inhuman and abominable. There was a kind of cold, invidious cynicism in that smile, the ecstasy of wickedness, the ignorance of impurity“<sup>42</sup> – describes one of the prisoners.

On the contrary, Sándor Réső Ensel shows more empathy for the imprisoned women and explains the high rate of recidivism by their vulnerable situation after re-entering society. In his work, he emphasises the importance of founding women’s committees to help prisoners’ reintegration as he sees their work to be indispensable: „Why does she who leaves the prison need patronage? Answer: The prisoner, who had been living left alone, alienated from the world for a long time, has to start looking for a new job while, if she is unknown, gets help from no one, and if she is recognised, everyone avoids and rejects her. In a situation like this, it is challenging even for an honest person to overcome the difficulties, and in a case of a newly released prisoner, whose righteousness is yet to be strengthened, in storms like this tenuous luck and bravery is needed to keep her on the path of honesty.“<sup>43</sup>

Looking back over several decades, it is not easy to tell which point of view carries the seed of truth, and the decision might tell more about the reader’s than the prisoners’ personality. Anyhow, for nearly a decade, thousands of women went to the penitentiary of Márianosztra and partly because of the decrease in the number of death sentences, partly

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<sup>40</sup> RÉSŐ ENSEL, *op. cit.*, p. 132.

<sup>41</sup> FALK, *op. cit.*, p. 42.

<sup>42</sup> ZÖLDI, *op. cit.*, p. 148.

<sup>43</sup> RÉSŐ ENSEL, *op. cit.*, p. 41.

due to the work of the sisters of the Order of Saint Vincent, these women got the chance to leave their past behind and start a new life after returning to society – the importance of this cannot be denied.

## 6. Conclusion

The Márianosztra Strict and Medium Regime Prison is still in operation, and although nowadays it houses both men and women prisoners, the building still has an inimitable historical atmosphere. After all, the history of the prison was exceptional as well: murderers and thieves were sent there, yet the visitors met no one but mothers raising their children alongside women cultivating gardens or reading prayer books. It was a prison where not handcuffs but Bible passages hanged on the wall forced the convicts to change their behaviour and thinking, where not physical punishment but spiritual care evoked repentance in them.

In the 19<sup>th</sup> and 20<sup>th</sup> century, journalists often wrote articles about Márianosztra, emphasising the sharp contrast between the prisoners' personalities as they came to know them with the crimes these women committed. They wrote about larcenists, infanticides, abortionists, women who killed their husbands and mothers who killed to protect their children. Unfortunately, I cannot recount their stories within the limits of this essay, but this has been done by the authors and journalists of the era: they painted a frank picture of the social conditions of the two centuries, when it was often poverty, vulnerability to domestic violence or exploitation of labour that made women end their suffering consciously or subconsciously.<sup>44</sup>

Undoubtedly, there were prisoners who committed serious crimes, crimes for which they might deserve neither acquittal nor absolution. But there were also women who were exiated for sins of which the society was at least as responsible as the perpetrators – this being another example of the dualities that made the penitentiary of Márianosztra exceptional among other prisons. Despite not being able to show everything, I hope I provided an insight into this outlandish world, where women got the chance of leaving the name of "frailty" behind.

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<sup>44</sup> To read their reports, see e.g. Z. M.: Mária-Nosztra, *Pesti Napló*, 1898/232, pp. 4–5.; Gyermekrabló asszony [Child-kidnapper woman], *Uj Szatmár*, 1912/5, p. 5.; RÁSKAY László: Halálon innen, életen túl... [Beyond life, before death...], *Pesti Napló*, 1926/140, p. 9.

# **Mateo VLAČIĆ: Infanticide in Croatia and Slavonia (1852–1918) – Criminal Legislation and Judicial Practice**

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## **1. Introduction**

Infanticide or infant homicide is the legal term for taking the life of a newborn child by its mother during childbirth or immediately after it. Criminal legislation of Croatia and Slavonia in the 19<sup>th</sup> century considered infanticide a type of justifiable homicide or privileged homicide, unlike older legislation which had considered it a capital crime. In general, the period of the 19<sup>th</sup> century represents a radical political and cultural break and could be considered a beginning of mitigating the criminal prosecution of the infanticide. Reasons for justifying the crime of infanticide, in comparison to other types of homicide, may be found in the motives of preserving honor, in the case when the child is born out of wedlock, and also in the mother's mental state disturbed by childbirth.

## **2. Criminal Code on Crimes, Misdemeanors and Contraventions of 1852**

The introduction of Criminal Code of 1852 in Croatian lands, as well as in all other parts of the Monarchy, represented an improvement, as despite its strictness and conceptual flaws, Croatia and Slavonia finally obtained a codified source of law in the area of criminal law. Legal particularism that had ruled in the area of substantial criminal law was terminated, as well as legal uncertainty and the arbitrariness of courts in deciding which legal norm to apply in a particular case.<sup>1</sup> In 1861, after the abolition of absolutism and when parliamentary life was reestablished, it tacitly became a part of the Croatian legislation. From 1861 onwards, the Croatian application of the Criminal Code of 1852 developed independently from the Austrian jurisdiction, although attention was paid to the Austrian judicature and commentaries on the Criminal Code. Due to the autonomy enjoyed in the

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<sup>1</sup> PASTOVIĆ, Dunja: "Dvostruki grijeh": kažnjavanje čedomorstva na hrvatskom području do kodifikacije kaznenog materijalnog prava 1852. godine ["The double sin": punishment for infanticide in the Croatian territory until the codification of substantive criminal law in 1852], *Hrvatski ljetopis za kaznene znanosti i praksu*, vol. 23, no. 1, 2016, p. 147.

affairs of judiciary, the Croatian Sabor adopted a number of significant amendments to the Criminal Code of 1852.<sup>2</sup>

### **2.1. Crime of infanticide in Article 139**

The Criminal Code of 1852 did not categorized infanticide as a special crime (*delictum sui generis*), but rather as a special kind of murder prescribed in the chapter XV "On murder and homicide". The legislator treated infanticide as justifiable homicide for which the mother as a perpetrator, due to her special mental state, was punished more leniently.<sup>3</sup> Although the Code in the legal definition of infanticide does not specifically mention any mental disorder, the words "during childbirth" indicated its existence and that they should be understood as follows: during the effects of childbirth on the woman's mental state. Furthermore, judicial practice confirmed the fact that the mother at the time of the crime had been under various psychological strains.<sup>4</sup>

### **2.2. The question of legitimacy of a child and acts of commission vs. omission**

The perpetrator of infanticide could only be the mother (*delicta propria*), while the object of this crime was the newborn legitimate or illegitimate child. Two different approaches to punishment for infanticide were introduced, depending on whether the child was legitimate or illegitimate. For a mother that murdered her legitimate child by acts of commission or omission, a life sentence in dungeon confinement was prescribed. If the victim was an illegitimate child and death occurred by an act of commission, a punishment of dungeon confinement in the duration of 10 to 20 years would be imposed. If an illegitimate child's death was caused by an act of omission due to the failure to provide necessary help, dungeon confinement in the duration of 5 to 10 years would be imposed. The explanation of different penalties for murder of a legitimate and illegitimate child did not consist in the object of the crime itself, because legitimate and illegitimate children

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<sup>2</sup> ČEPULO, Dalibor: Hrvatska pravna povijest u europskom kontekstu [Croatian Legal History in the European Context], Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2012, pp. 151–158.

<sup>3</sup> ŠILOVIĆ, Josip: Kazneno pravo, Po Dru. K. Janki [Criminal law, By K. Janka], Fourth edition, Zagreb, 1908, p. 286.

<sup>4</sup> PASTOVIĆ, *op. cit.*, p. 148.

had the same right to live and the same legal protection, but in a particularly difficult position of illegitimate mothers.<sup>5</sup>

### **2.3. The contravention of concealment of birth in Articles 339–340**

Unmarried pregnant women belonged to the high-risk group for committing infanticide. To prevent that, the legislator prescribed the contravention of concealment of birth. The perpetrator of this offence was an unmarried pregnant woman, who failed to notify a midwife or another woman of honor that she was pregnant and going to give birth. If labor was unexpected and she did not have the time to call for a midwife, and she gave birth to a stillborn, or the child died within 24 hours after birth, she was to notify a midwife or another official along with displaying the stillborn body. The prescribed penalty was a prison in the duration of three to six months. To reduce a high infant mortality rate, midwives were obliged to report all suspicious cases of death under the threat of being punished with pecuniary fine.<sup>6</sup>

### **2.4. Complicity in the crime of infanticide**

Considering that infanticide was not treated as a special crime and was categorized as a special kind of murder, a question arose how to approach cases of complicity in infanticide. According to provision of the Criminal Code of 1852 on the infanticide, mother could be the only perpetrator of that particular crime and the penalty prescribed for infanticide could be imposed only on mother. Other participants (accomplices, aiders and abettors) in infanticide should be convicted of murder. Therefore, if another person kills a newborn during or immediately after childbirth, he should be punished for murder, while the mother was to be punished as an accomplice for infanticide.<sup>7</sup>

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<sup>5</sup> ŠILOVIĆ, Josip (ed.): Kazneni zakon o zločinstvih, prestupcih i prekršajih od 27. svibnja 1852 sa zakoni od 17. svibnja 1875, o porabi tiska, o sastavljanju porotničkih imenika i o kaznenom postupku u poslovih tiskovnih, preinačenimi zakonom od 14. svibnja god. 1907, o promjeni tiskovnih zakona; i sa zakoni i naredbami koji se na nje odnose ter sa rješitbami kr. stola sedmorice i vrhovnog suda u Beču [The Criminal Code on Crimes, Misdemeanors and Contraventions of 27<sup>th</sup> May 1852, including Laws of 17<sup>th</sup> May 1875 on the Printed Matters, on Compiling a List of Jurors for Jury courts and on Criminal Procedure in Publishing Offences, together with the amendment of 14<sup>th</sup> May 1907, laws and orders related to them, as well as decisions of the Table of Seven and the supreme court in Vienna], Fourth edition, Hrvatski zakoni vol. 15, Zagreb, 1921, Art. 139, pp. 151–152.

<sup>6</sup> PASTOVIĆ, *op.cit.*, pp. 148–149.

<sup>7</sup> ŠILOVIĆ, Kazneni zakon o zločinstvih, prestupcih i prekršajih od 27. svibnja 1852, p. 152.



## **2.5. Secret births and infanticide**

Women charged with infanticide who concealed their pregnancy and gave birth in full secrecy intended to be acquitted or at least to reduce the charges by restoring with their defenses to unconsciousness as the reason for not providing necessary assistance to the newborn. These cases occurred often in judicial practice. Initially, medical experts rejected that argument stating that loss of consciousness was merely an excuse by the defendant. A significant change has occurred at the beginning of the 20<sup>th</sup> century, when the medical profession started to accept the possibility of loss of consciousness during all stages of childbirth, due to severe pain and blood loss. Considering that there were no clear signs based on which a medical expert could conclude if the defendant was telling the truth about unconsciousness, he could only state in his report a probability based on his own experience, previously recorded cases and a detailed examination of the course of the particular delivery. If the unconsciousness occurred, and the court appreciated it, the defendant would be acquitted. At all occasions, defendants were regularly convicted of committing the contravention of concealment of birth.<sup>8</sup>

## **3. Infanticide cases in Croatian judicial practice from 1852 to 1918**

By putting forth judicial decisions in infanticide cases, we will try to demonstrate main issues and how they were resolved. The main issues related to: the question of committing an infanticide by commission or omission, the question of child legitimacy and the problem of complicity in infanticide.

### **3.1. The criminal intention is a mental element (*mens rea*) of all cases of infanticide, but by the cause of death it should be determined whether it was caused by commission or omission**

In infanticide case from 1886, the defendant had left her newborn child in a secluded place with the intention of killing it. Therefore, she had committed an act by omission. Based on this fact, the court conviction was that for committing the crime of passive infanticide. In passive infanticide, not only is the mother the passive agent but she also secures the

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<sup>8</sup> PASTOVIĆ, *op.cit.*, pp. 149–150.

occurrence of death actively, in this case by leaving the child in a desolate location. For distinguishing between these two terms, the cause of death is key. If death occurred due to natural causes which mother did not stop, it was passive infanticide. If the cause of death, along with the ones the mother did not stop, included those which had been actively caused by the mother, then it was a case of commission or active infanticide. The distinction between omission and commission was important due to different penalties which were prescribed. Commissions usually involve more malicious motives and intentions than the corresponding omissions, so harsher penalty was imposed.<sup>9</sup>

### **3.2. The question of child legitimacy is decided by the judge within his discretion and he is not bound by the regulations of the General Civil Code**

By the judicial decision of the Royal Court Table from 1901 mother was convicted of crime of infanticide committed against her illegitimate child and sentenced to two years in dungeon confinement. The State Attorney's Office appealed this judicial decision because of the court's claim that the child was illegitimate. There had not been sufficient evidence to support that claim and the court had failed to advert to any legal institution. The Croatian Supreme Court Table of Seven dismissed the appeal citing that the court decides on the legitimacy based on their own judgement according to the regulations of the criminal procedure and not civil law.<sup>10</sup>

### **3.3. Indictment for infanticide does not contain the proposal to be tried for the contravention of concealment of birth**

The Croatian Supreme Court Table of Seven deciding on the State Attorney's Office appeal against an acquittal, confirmed that the Court of First Instance had not failed to rule on the charge against the defendant by not engaging in resolving the question whether the

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<sup>9</sup> Nakana usmrtni jest zajednička potrebština obih vrsti čedomorstva (§ 139 k. z.); po uzroku smrti treba suditi, da li postoji negativno ili pozitivno čedomorstvo [The criminal intention is a mental element of all cases of infanticide (§ 139); by the cause of death it should be determined whether it was caused by commission or omission], Mjesečnik pravničkoga društva u Zagrebu, vol. 14, 1888, pp. 248–249.

<sup>10</sup> O pitanju zakonitosti ili nezakonitosti djeteta odlučuje kazneni sudac po svom slobodnom osvjedočenju, te nije vezan na propise građanskog zakona [The question of child legitimacy is decided by the judge within his discretion and he is not bound by the regulations of General Civil Code], Mjesečnik pravničkoga društva u Zagrebu, vol. 28, 1902, pp. 612–613.

defendant committed the offence of concealment of birth. The Court of First Instance resolved the charge for infanticide with an acquittal, while the possible proposal for the offence of concealment of birth was not included by the State Attorney's Office.<sup>11</sup>

### **3.4. Mother can be an accomplice in the infanticide of her own child in terms of Article 5 of Criminal Code of 1852**

State Attorney's Office charged a mother and father with premeditated murder of their illegitimate child. The mother had pressed the child's neck and prevented air from going through, while the father stood on the child's torso and face with his foot and caused severe head injuries and rib fracture which helped the suffocation. The mother was charged with infanticide, while the father was charged with murder. With a verdict passed on March 16, 1906, the mother was found guilty as an accomplice in terms of Article 5 of Criminal Code for the act of murder, by obtaining the necessary means, removing any obstacles and facilitating the successful execution of the crime. The court could not prove that the mother had taken part in the murder by placing her hand on the newborn, only that she had acted as an accomplice. Based on these reasons, the prevailing standing was that a mother can commit murder as an accomplice in terms of Article 5, and not as an accomplice in infanticide. Since infanticide was not a special crime, but rather as a special kind of murder prescribed in the chapter XV "On murder and homicide", the court concludes that infanticide is a type of murder, for which less grave penalty for mother was provided. Therefore, the mother can be an accomplice in her own child's murder, but she must be sentenced for infanticide according to Article 139.<sup>12</sup>

### **3.5. For the crime of infanticide, it is required that a mother killed her child during childbirth**

In the infanticide case from 1905, after delivery a mother and her child were released from hospital. The same day, due to a fear of her stepmother, she threw her baby in a stream.

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<sup>11</sup> U optužbi zbog zločina čedomorstva ne nalazi se podjedno i prijedlog, da se sudi zbog prekršaja § 339. k. z. [Indictment for infanticide does not contain the proposal to be tried for the contravention of concealment of birth in § 339], Mjesečnik pravničkoga društva u Zagrebu, vol. 44, 1918, pp. 371–372.

<sup>12</sup> Mati može počiniti zločin umorstva na vlastitom novorođenom djetetu kao sukrivac u smislu § 5. k. z. [Mother can be an accomplice in the infanticide of her own child in terms of § 5 of Criminal Code of 1852], Mjesečnik pravničkoga društva u Zagrebu, vol. 32, 1906, pp. 932–934.

Even though the State Attorney's Office charged her with murder, the first instance court sentenced her for infanticide to five years of dungeon confinement. Quoted reasons for the conviction of infanticide were the defendant's depression and mental state, which lasted until the criminal act was completed. Furthermore, the court claimed that the time of birth even in the most normal circumstances is considered from the moment of birth until the time the baby is brought home. State Attorney's Office appealed the conviction and the Croatian Supreme Court Table of Seven overturned the judicial decision and ordered a new public hearing, which resulted with the same ruling. That decision was appealed again. After appeal, the Table of Seven itself conducted public hearing and convicted the mother of murder. In that case the court considered that the mother and baby had been released healthy, travelled by train from Zagreb to Krapina, and afterwards walked three hours to the scene of the crime. Therefore, the defendant had been physically healthy and neither her mind nor spirit was deranged.<sup>13</sup>

#### **4. Conclusion**

The Criminal Code of 1852 recognized infanticide as a special situation and assigned substantially milder punishments to it than to other crimes against life. It differentiated significantly between legitimate and illegitimate children as victims of the crime. It punished mothers who killed babies born out wedlock less severely than those who murdered babies born to married parents. Changes for the punishment for infanticide are considered a triumph of enlightenment humanism and a direct consequence of the insights about the social causes of the crime. Fear of disgrace and of poverty resulted in the classification of infanticide regarding illegitimate children. Also, the Code of 1852 noticed that there might be a causal relationship between pregnancy, childbirth and subsequent maternal mental disorder.

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<sup>13</sup> Za učin zločina čedomorstva traži se, da je mati usmrtila svoje diete u porodu [For the crime of infanticide, it is required that a mother killed her child during childbirth], *Mjesečnik pravničkoga društva u Zagrebu*, vol. 32, 1906, pp. 625–626.

# **Ákos Tibor KOVÁCS: The History of Duel in Hungary between the Second Half of the 19<sup>th</sup> Century and the First Half of 20<sup>th</sup> Century**

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## **1. Introduction**

The first anti-duel conference<sup>1</sup> was held in Budapest between the 4<sup>th</sup> and 6<sup>th</sup> of June 1908, in 2018 we celebrated the 110<sup>th</sup> anniversary of this event. Thereafter the formation of the modern state, independently of the reigning political power, the unbroken aim was to create the criminal monopoly of state and discourage the prosecution of rights through private channels in actions falling within the criminal substantive law. Compare Hungary with Europe, in Hungary the duel was exceptionally wide-spread which was used for retaliating for offence of libel. The duel resembles those times when criminal monopoly hasn't existed yet and people took revenge themselves for illegal actions. In this paper I intend to summarize the history of duel in Hungary with special regard to the social characteristics, the notion and forms of duel, the chivalrous procedure and finally the summary of the regulation of substantive law.

## **2. The duel as a social phenomenon**

I have to emphasize that the duel not only related to the law but there are strong sociological connections as well. We must be taken up with the social background of the 19<sup>th</sup> century to understand the evolution of duel. In vain for 100 years since the great French Revolution, the fundamental human rights (liberty, equality and fraternity) which were formulated there, couldn't become general and couldn't come across. Within the social jockeying for position the social origin still had a great significance moreover certain classes of society had major privileges. These conditions were enhanced in Hungary, where the nobility and the upper middle class possessed the greatest number of liberties. After the emancipation of serfs, the feudal privileges had gone and the equality before the law

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<sup>1</sup> S. A. R. DON ALFONSO de Bourbon et d'Autriche-Este infant d'Espagne: Résumé de l'histoire de la création et du développement des ligues contre le duel et pour la protection de l'honneur dans les différents pays d'Europe de fin novembre 1900 à fin octobre 1908. [Summary of foundation and development of the anti-duel leagues and the protection of honour in Europe between 1900 november and 1908 octobre] Vienne. Frédéric Jasper. 1908.

materialized however the unwritten laws – which separated and discriminated the upper classes of society – continued in existence.

Norbert Elias made a thorough examination of those classes of society in Germany which represented jointly „ the collective qualified for duelling”.<sup>2</sup> The representatives of these upper classes could give duel for slander to those who committed this felony. However, this right wasn't guaranteed for everybody. It's a remarkable fact that those judges – who were entitled to judge these affairs – were also members of the upper class that's why sometimes they were biased positively. At the beginning of the 20<sup>th</sup> century this tendency has started to change, more and more parliamentary immunity was suspended in order to arrest those politicians who were affected by these affairs.<sup>3</sup> Naturally, the period tabloids covered these trials.

Many authors of rules of duelling endlessly describe the reason for the existence of duel. Vilmos Clair justified the existence of duel with these words: „the society repudiate the collectivity with that honourable man who hasn't avenged attack of honour upon the libeller”.<sup>4</sup> On the other hand, Vilmos Rácz believed that there are certain offences when it becomes public – so the proof on a public trial – it does more severe harm to the offended party than the offence itself.<sup>5</sup> Moreover, according to this same author if the duel didn't exist, then there wouldn't be a reconciliation after the slander between the noble men, because “nobody wants to risk life and limb”<sup>6</sup>, sensible gentlemen tried to avoid the duel.

In his essay Mihály Herczegh analysed the moral depravation and in his opinion the legislation couldn't offer an effective solution for that. <sup>7</sup> For this reason, a private prosecution of right is needed although it is a crime, but it is appropriate for – in conformity with custom law – amends.

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<sup>2</sup> ELIAS, Norbert: A párbajképes társadalom. [Those who are qualified for duelling] In: ELIAS, Norbert: A németekről. Budapest, 2002, Helikon Kiadó. p. 42.

<sup>3</sup> JUHÁSZ, Andrea: A párbajdal vétsége és az államfogház-büntetés a Csemegi-kódex szabályozásának tükrében [The misdemeanour of duel and the retribution of state-prison in Csemegi Code]. *De iuresprudentia et iure publica*, 2014/2, p. 1.

<sup>4</sup> CLAIR, Vilmos: Párbaj-Codex [Duelling Code]. Budapest, 1914, Singer és Wolfner Kiadása, p. 1.

<sup>5</sup> RÁ CZ, Vilmos: Párbaj-kodex és lovagias eljárás. [Duelling Code and chivalrous procedure]. Budapest, 1923, Hornyánszky Viktor M. Kir. Udvari Könyvnyomdája, p. 17.

<sup>6</sup> *Ibid.*, p. 24.

<sup>7</sup> HERCZEGH, Mihály: A párbaj keletkezése és csökkentése [The origin and reduction of duel]. Budapest, 1903, Politzer Zsigmond és Fia, pp. 5–6.

The modern duels grew from the knightly duel which was fought for "fame, glory and honour by the high-minded knights".<sup>8</sup> As follows only knights could exercise this privilege. Furthermore, the chivalrousness wasn't sufficient but only unimpeachable gentlemen could take up the gauntlet.<sup>9</sup>

### **3. The history of legal regulation of duel in Hungary**

After the description of the social aspects of duel I would like to present the Hungarian history of it, but first, I have to deal with the most famous duel in the world. The duel is the same age as humanity: everybody has heard the story of David and Goliath where the small-statured David defeated Goliath the giant of Philistines with the assistance of intelligence and sling-stones.<sup>10</sup>

In the early court hearings, the ordeal constituted the basis of proof, so calling God to help in establishing the culpability or the guiltlessness of the defendant. The theological base that God would not allow to not find the truth. One of the forms of ordeals is the trial by combat during which the winner of duel becomes the innocent party because he could win with the help of God. The kings of the Árpád dynasty primordially did not approved of duel but in those days the ordeals were general, so they could do nothing to stop it. During the Angevin period the stake of duels was the reputation of the Hungarian nation and during the mixed dynasty ("vegyesházi királyok") period – especially during the reign of King Mathias – the Hungarian champions fought duels with the Turkish soldiers. That is interesting because Charles Robert, Louis I, and Mathias I made strict rules in connection with the duels. Act 18 of 1486 of Mathias I declare that duels cannot be judged in front of royal benches exceptionally the martial Curia but also there just in the absence of evidence. Act 37 of 1492 of Ladislaus II repealed the duels because "innumerable cheating happens during the duels" bears in the preamble.<sup>11</sup> Moreover, the principles do not accept the challenge, however they put forward champions who are bribable.

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<sup>8</sup> CLAIR, *op. cit.*, p. 10.

<sup>9</sup> DESSEWFFY, Arisztid: Párbajellenes mozgalom Magyarországon. [The anti-duel movement in Hungary] Budapest, 1905, Singer és Wolfner Kiadása, pp. 7–8.

<sup>10</sup> Szent Biblia [Holy Bible], Budapest, 2015, Szent Jeromos Katolikus Bibliatársulat. 1 Sámuel, 17,38-50

<sup>11</sup> BATÓ, Szilvia: Egy jelenség alakváltozásai: a párbaj útja a bizonyítási eszköztől a bűncselekményig [The metamorphosis of an occurrence: the duel from the measures of inquiry tot he misdemeanor]. In: BALOGH,

After Louis II had ascended the Hungarian throne in royal command, he inflicted capital punishment of death for the duellists to put a stop the duels. Despite these efforts the number of duels did not decrease. Maria Theresa also punished with death the duel in royal command in 1752,<sup>12</sup> but these steps still did not stop the noble gentlemen. With putting into force the Sanctio Criminalis Josephina<sup>13</sup>, Joseph II reinforced his mother's measures so he has had bring the duellists to military court.<sup>14</sup> The next legal source which we have to go into is the Proposal of Ferenc Deák about the Hungarian criminal code from 1843.<sup>15</sup> In the genius work of Deák the duel wasn't an independent crime, however the duel was punished according to its result. So, if the duellists agree on the duel until death and one of them fall victim then the murderer would be responsible for intentional murder. If the death is unintentional the situation would be qualified as manslaughter through negligence. Finally, Csemegi Code was the first codified Hungarian criminal code which classified the duel as an independent misdemeanour but later I will talk about it more particularly.

#### **4. The definition and forms of duel and chivalrous procedure**

The definition of duel can be determined several ways. In this part, I quote some definition pointing out to the common elements. By way of introduction, I have a small comment that the Csemegi Code did not determine the definition of duel, it entrusted the definition of concept to science.<sup>16</sup> „The duel is the combat of two persons fought by conventional weapons after taking up the gauntlet, according to the pre-defined rules”.<sup>17</sup> William Clair gives the following definition: „We call duel that combat which is fought by two persons

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Elemér – HOMOKI-NAGY, Mária (eds.) Ünnepi kötet Blazovich László egyetemi tanár 70. születésnapjára. Acta Universitatis Szegediensis. Acta Juridica et Politica Tomus LXXV. Szeged, 2013, p. 80.

<sup>12</sup> HÖGEL, Hugo von: Geschichte des österreichischen Strafrechtes Vol. II. Wien, 1905, p. 115.

<sup>13</sup> A törvénykönyvet 1787 tavaszán kiadott rendeletével léptette hatályba Magyarországon – Általános törvény a büntettekéről és azoknak büntetésekről. [Sanctio Criminalis Josephina, 1787]

<sup>14</sup> CLAIR, *op. cit.*, p. 43.

<sup>15</sup> 1843-ik évi Magyar Büntető Törvénykönyvi Javaslat. [The Proposal of Hungarian Criminal Code from 1843] Pest, 1865, Kugler, pp. 41–42.

<sup>16</sup> FINKEY, Ferenc: A magyar büntetőjog tankönyve. [Textbook of Hungarian Criminal Law] Budapest, 1909, Grill Károly Könyvkiadóvállalata, p. 571.

<sup>17</sup> KAUTZ, Gusztáv: A magyar büntetőjog tankönyve különös tekintettel a gyakorlati élet igényeire [Textbook of Hungarian Criminal Law with special regard to the judicial practice]. Budapest, 1881, Eggenberger, p. 549.



with conventional weapons and with the help of witnesses under pre-defined rules based upon an insult”.<sup>18</sup>

It is redundant to examine more definition because it can be laid down as a fact there is a consensus in the definition of duel among the authors. Pál Angyal in his volume of essays and studies glances over the rules of duel based upon the general belief and the contemporary prevailing criminal codes. I take for certain that duel is the fight between two persons, if the combat moves on among more persons the case would be qualified in accordance with the Article 75 of the Act 40 of 1879,<sup>19</sup> translating this to the valid criminal code it would realize the crime of ruffianism.<sup>20</sup> Duel assumes physical contact too, so one of the parties endeavours to conquer the other one.<sup>21</sup> On behalf of both parties, the serious determination and the intention for attack are needed. The rules of duel contain the definition of weapon or conventional weapon, however we are talking about unwritten rules so it can be a kind of consensus in the definition of weapon but there can be differences among the different duel codes. So that is why we have to consider weapon in a technical sense. We can consider weapon all those instruments which are suitable for exterminating life and the duel codes recognize it as a weapon as well.

The duel is an intentional action: it is realizable in every stage (preparation – taking up the gauntlet; attempt – standing out to fight a duel; accomplished act – one of the parties takes the offensive). The protected legal subject-matter is the human physical condition and life, nevertheless many jurists discuss this point of view. Ludwig Feuerbach, Hagbard Berner, Hugo Hälschner and the valid Italian criminal code in that time consider duel as crime against jurisdiction<sup>22</sup>, C. J. Anton Mittermaier and Heinrich B. Gerland in addition, the French Code Pénal define it as a crime against law and order. Pál Angyal summarizes all the conceptual elements in his definition: „The duel is a fight between two persons which based on mutual agreement and it is sanctioned by the generally accepted

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<sup>18</sup> CLAIR, *op. cit.*, p. 61.

<sup>19</sup> Act 40 of 1879, Article 75: Scuffle in the street, on a square, in a pub, in a restaurant or any public place – if there is no physical injury – is punishable with 8 days custody and 50 HUF fine.

<sup>20</sup> Act C of 2012 on the Criminal Code under Article 339 para. 1: Any person who displays an apparently anti-social and violent conduct aiming to incite indignation or alarm in other people is guilty of a misdemeanour punishable by imprisonment not exceeding two years, insofar as the act did not result in a more serious criminal offense.

<sup>21</sup> ANGYAL, Pál: *Az ember élete elleni bűncselekmények és a párviadal* [Crimes against life and the duel]. Budapest, 1928, Athenaeum, p. 96.

<sup>22</sup> This theory is deducible from the criminal monopoly of the State, because the principal who fight a duel disregard the prohibitive laws created by the State.

rules of duel. It is taken action against each other and the life or physical condition of the principals is threatened by each other."<sup>23</sup>

We can distinguish one duel from another with regard to what kind of weapon was chosen by the principals. Three kinds were separated from each other: the sword, the rapier and the pistol. In Hungary, the sword and the pistol were widespread duel weapons, the rapier was used rather in Western Europe, for the most part in France. The Hungarian duel regulations contained the rapier as a duel weapon because if a foreigner chose it, he could have the chance to fight a duel with it. The duel weapons had to comply with strict requirements. Both the swords and the rapiers had to be equal to shape, length, weight and centre of gravity and they could be sharp and pointed or blunt. Additionally, the pistols had to match and the permissible deviation between the barrels could not be bigger than three centimetres.<sup>24</sup>

I have to refer to the drawing straws as the so-called "American duel". The public opinion did not consider the American duel as a real duel because of the lack of conceptual elements of the duel. The main point of the "American duel" is deciding who of the two should commit suicide or go into self-imposed exile or renounce something.<sup>25</sup> The Csemegi Code settled it at the regulations of suicide as a special committal of crime.<sup>26</sup>

Referring back to the first part of my study, the origin of duel can be found in the Middle Ages, those conceptual elements which are the basics of the modern definition of duel date back to the age of chivalry. It should be noted that, the "chivalrous procedure" isn't necessarily ended with duel. As RÁCZ refers to the fact that, „the chivalrous procedure was shaped by the several thousand years old social standards and the rules were formulated by customs. The sanction of it, is: duel”.<sup>27</sup> Accordingly to the author, duel is a sanction that was fought when the conflict couldn't be finished peacefully. The chivalrous procedure can make for asking amende honorable or summons to apology.<sup>28</sup> Which steps form the chivalrous procedure?

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<sup>23</sup> CLAIR, *op. cit.*, p. 98.

<sup>24</sup> *Ibid.*, pp. 89–90.

<sup>25</sup> Pallas Nagyciklopédia [The big Encyclopaedia of Pallas], Volume I, Budapest, 1893, Pallas Irodalmi és Nyomdai Rt., p. 782.

<sup>26</sup> Article 283 of Csemegi Code.

<sup>27</sup> RÁCZ, *op. cit.*, p. 22.

<sup>28</sup> ANGAL, *op. cit.*, p. 107.

The first step, when the principal, who suffered the insult doesn't bring a suit against his adversary, however he turns to the injurer. If the principals don't know each other, they will exchange their business cards in order to stay in touch easier. The principals name their witnesses who start to negotiate, where they decide whether an offense has occurred or not. If an offense occurred, they will discuss the gravity of it. They determine what kind of gratification produce as a consequence and can the conflict can be resolved peacefully, or it must necessarily fight the duel. Typically, gentlemen were loath to risk their life that's why they incline to make peace. Naturally, they had to deal with challenging to duel because it was a social expectation that if somebody was a victim of slander, he had to clear up the situation.

## **5. The misdemeanour of duel in the Csemegi Code**

The duel was regulated among crimes against life and physical condition in the Csemegi Code. The cause of this was that the result of duel was duplex: the duel could have an end with death or physical injury.<sup>29</sup> The protected legal subject-matter was life and physical condition. The committal supposes an intentional and active action: the unintentional committal is excluded. I have already presented the stages of duel, however I would like to highlight that the committal will come under the ruling of Article 19 of Csemegi Code if the principals submit themselves to the rules of duel, otherwise depending on the result the dispositions „with regard to life and physical condition have to be applied”.<sup>30</sup>

According to the Article 293 of Csemegi Code, throwing down and taking up the gauntlet – as the preparatory measure of duel – constitute a misdemeanour and it is punishable with six-months prison. The crime was committed even if the principal had not taken up the gauntlet. It's to be remarked that in compliance with the judicial practice of the Hungarian Supreme Court (Curia), the challenge had to refer to duel specifically to armed combat.<sup>31</sup> If a fight ensued, on the basis of consumption<sup>32</sup> the throwing down and taking up the gauntlet merges into the accomplished form of duel. At the same time, if the

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<sup>29</sup> EDVI ILLÉS, Károly: A büntettekről, vétségekről és kihágásokról szóló magyar büntető törvénykönyv magyarázata. [The commentary of Hungarian Criminal Code about felonies, misdemeanours and contraventions] Vol. II., Budapest, 1882, Zilahy Sámuel, pp. 406–407.

<sup>30</sup> JUHÁSZ, *op. cit.*, p. 4.

<sup>31</sup> FINKEY, *op. cit.*, p. 573.

<sup>32</sup> The misdemeanour merges into the more serious crime.

intention to the challenge was not determined in so far, the offended party had just asked for gratification, the misdemeanour failed to materialize.

The Criminal Code didn't forget about the accomplices – who didn't put under the same heading with the witnesses of duel – and those who tried to hinder the peaceful conciliation between the principals. The abettors were punishable more seriously, an abettor was who encouraged for duel, and they were penalized with one year of prison.<sup>33</sup> Standing out to crossing swords was the trial of the misdemeanour of duel. If somebody gave up the duel, it wasn't necessary to meet him out a punishment. It was a gap on the regulation that the Csemegi Code didn't contain rules for, if the principals stood out and fought a duel – hereby they realized the accomplished form of duel –, however no injury occurred. In this case, the trial and "the duel without a result" were punished with the same amount of punishment.<sup>34</sup>

## **6. The basic and qualified conformation of duel**

Firstly, the basic conformation of duel is when during the duel there is no injury. Secondly, the two paths of the qualified conformation of duel are when a severe injury occurs, or somebody dies. To all intents and purposes, in this situation we can talk about the accomplished and "successful" forms of duel. The basic bearing of case (first phrase of Article 298)]: „A person who injures his principal in a duel is punishable by two years of state prison.”

The second phrase of Article 298: „If the injured person lost one of the parts of his body or his senses or if the person has suffered an incurable injury: the punishment will be three years of state prison.” The action comes under the ruling of this Article even if one of the principals cut a little finger of the other principal. Sensation means in this context the physiological sensations like sight, hearing, taste, smell, and sense of touch. The incurable injury must be understood as sustained injury.

And finally, the gravest conformation in the third phrase of Article 298: „And the one, who killed his opponent in the duel, though his death did not happen immediately, is

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<sup>33</sup> Act 5 of 1848, Article 295

<sup>34</sup> FINKEY, *op. cit.*, p. 574.

punishable by a five-year state prison.” This rule shall be applied, if the injury rose from the duel, had caused the death of one of the principals.

We have to examine, what the intention of perpetrator covers. The conformation in Article 298 not only realize if the perpetrator’s action was intentional, but also when the perpetrator’s intention was potential. „So, it’s enough to desire the duel with the consciousness that the duel is life-threatening and dangerous to the physical condition.”<sup>35</sup>

## **7. The irregular duel and the condition of second fiddlers in duel**

Article 299 of Csemegi Code defines the cases of irregular duel. Thus, if the principals break the customary rules of duelling, and one of the principals dies or is injured in the irregular duel, the action of the offender will be qualified as a murder or as a serious bodily injury.

Referring to the commentaries and the preamble it is an expert question is what we consider to be the rules of duel. In that time there were two significant Duelling Codes, one of them is the Code of William Clair and the other one is the work of Francis Bolger.<sup>36</sup> The customary rules were widespread, and the rules established on a mutual agreement between the principals were those where the principals determined the deviations from the customary rules. The law treats the witnesses as an accomplice, and they are punished within the domain of murder or aggravated assault. As far as the second fiddlers is concerned, the Criminal Code particularly declares that witnesses, doctors and witnesses who are engaged in the peaceful settlement of the conflict are not punishable.

## **8. The anti-duel movement in Hungary**

On July 10, 1903, the National Anti-Duel Union was established which had outgrown from the Anti-Duel Union from Nagyvárad. I would like to mention that one of the reports about the establishment of the Anti-Duel Union appeared in *Nagyvárad* *Napló* on July 11, 1903

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<sup>35</sup> ANGYAL, *op. cit.*, p. 110.

<sup>36</sup> BOLGÁR, Ferencz: A párbaj szabályai. [The rules of duel] Budapest, 1888, Grill Károly Könyvkiadóvállalata. At that time there were other, not less well-known Codes of Dueling, for example the work of Louis Chapon or Gyula Lovas.

written by famous Hungarian poet, Endre Ady.<sup>37</sup> In the article he didn't give positive information about this news because he saw the end of the Anti-Duel Union from Nagyvárád in it.

The first president of the Union was Charles Zipernovszky and Arisztid Dessewffy discharged the duties of the secretary. There were several reasons of the foundation of the National Anti-Duel Union. Arisztid Dessewffy laid down the most important reason which is the "distortions" appeared at the end of the 19<sup>th</sup> century in connection with the duel. He noted many of these distortions in his pamphlet from 1905. At that time, "duelling double arms" started to become popular, i. e. the principals fought for example with a rapier and also a pistol. This method was problematic according to the author, because duel demeans on the ground of the personal and passionate revenge. That's why the principals mustn't have fought a duel for life and death or until the last ditch, responsible witnesses obliged to hinder that in every case. Moreover, instead of the chivalrous procedure, gentlemen often applied "challenge" which was freer. Instead of employing witnesses it was enough to employ attestants, furthermore, „if the gentleman isn't reconciled with his opponent, doesn't shake hands, in fact he leaves without salutation from the battlefield he will make a reservation that he doesn't rehabilitate his principal and doesn't acknowledge his chivalrousness”.<sup>38</sup> According to Dessewffy, it deteriorates the duel to a plebeian scuffle. That's why, somebody who stumbled upon a man, who proposed just proposed the challenge, and the chivalrous gentleman should choose the prosecution of right in front of a tribunal. If it comes to light after the challenge that the provoker wasn't a chivalrous person, the chivalrous gentleman should choose the apology and the avoidance of duel. An additional problem that witnesses "deteriorated"<sup>39</sup> because witnesses were often unskilled, several times they followed the instructions of the opponent principal, however the witnesses should encourage to apologize and avoid fighting a duel.<sup>40</sup>

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<sup>37</sup> *Nagyvárad Napló*, July 11, 1903

<sup>38</sup> DESSEWFFY, *op. cit.*, p. 8.

<sup>39</sup> *Ibid.*, p. 12.

<sup>40</sup> »Ce ne sont ni les balles, ni les épées qui tuent. Ce sont les témoins.« - LE COMTE DU VERGER SAINT-THOMAS, Charles: *Nouveau Code du Duel*. Paris, 1879, E. Dentu, Libraire-éditeur, p. 206.

## 9. How to stop the duel?

At the beginning of the 20<sup>th</sup> century not only the National Anti-Duel Union but also noted jurists made suggestions in order to stop duelling. The first suggestion was to set up a National Court of Honour in Budapest<sup>41</sup>, which can consider from case to case if there is a place for duelling or not and it can motivate the parties to arrange their conflict peacefully. The second suggestion urged a more rigorous punishment of slander breaking with the indulgent judicial practice.<sup>42</sup> According to the Article 261 of Csemegi Code: "Who uses a defamatory expression against somebody, or commits a defamatory action (...), commits the misdemeanour of slander and is punishable by three months of prison and a fine up to HUF 500. – if the defamatory statement was published or distributed." However, the courts-imposed fines of 2 to 10 crowns ("korona"), punishments of 30 to 60 crowns were rare, prison and fines up to 200 crowns were extremely rare.

The well-educated, restrained and morally unexceptional witnesses could assist to avoid fighting a duel and they could take a roll in the peaceful mediation. Moreover, the army could prohibit its officers fighting a duel, as many duelling arose from the rule that the breach of an officer's honour had to be avenged immediately.<sup>43</sup> Herczegh and the members of the National Anti-Duel Union emphasized the role of the society. The Union hoped a relentless severity against those who insult resolutely the members of the upper classes whose only goal was to provoke a duel. The Union encouraged the upper classes to cast out these recalcitrant elements as "a penetrating ulcer from the healthy body".<sup>44</sup> Besides that Herczegh underlined the role of women. The duel was common among men (but women also could fight a duel) and they often did it in order to fascinate a woman. That's why the Union asked women to show favour toward gentleman who morally emerges from his companions and not by his physical performance in duels.

## 10. Conclusion

The duel was a widespread method to solve conflicts in the upper class of the society mainly from the middle of the 19<sup>th</sup> century until its end, but also at the beginning of the

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<sup>41</sup> HERCZEGH, *op. cit.*, p.14.

<sup>42</sup> *Ibid.*, p. 15.

<sup>43</sup> *Ibid.*, pp. 17–18.

<sup>44</sup> *Ibid.*, pp. 19–20.

20<sup>th</sup> century. Mostly, the slander was punished with duel, remaining outside the state jurisdiction for several reasons. Firstly, the punishment of slander was too mild. Secondly, sometimes publicizing the case, the object of slander was more harmful towards the harmed person than the mere statement. Thirdly, gentlemen thought that it's subordinating to affirm in front of a tribunal that the statement was a slander.

The fact that Csemegi Code penalized the duel in an independent Section throw light on that legislators wanted to decrease the number of duels or at least limit it. The preamble of the Code refers to duel as a "destructive social disease". That's why most of the legislators wanted to ban the duel as a method of conflict resolution. However, we can observe that duel was not punished very severely and maybe it's because that the representatives of the Parliament and the judges themselves were participants of duel many times.